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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1[illegible]

DEBORAH A. NORTHCROSS, *et al.*,

Petitioners,

—vs.—

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on December 4, 1973.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported, and is reprinted in the Appendix, *infra*, pp. 1a-6a. The opinion of the United States District Court for the Western District of Tennessee is unreported and is reprinted in the Appendix, *infra*, pp. 7a-32a.

Prior reported opinions in this matter are found at 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962); 333 F.2d 661 (6th Cir. 1964); 420 F.2d 546 (6th Cir. 1969), 420 F.2d 548 (6th Cir.), *remanded*, 397 U.S. 232 (1970); 312

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Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered December 4, 1973.

Questions Presented

1. Where there is a plan in the record, drawn by local school administrators, which would desegregate every facility and which is shown to be feasible and practicable, without contradiction either by the evidence or in the opinion of the district court, can Memphis' dual school system be said to be dismantled and only unitary schools established by the implementation of another plan which assigns 21,000 black students (nearly one-third of all black pupils in the city) to 25 all-black or virtually all-black schools?

2. Did the courts below err in approving implementation of that less effective plan since:

   (a) the trial court made no specific findings which, under *Swann,* could support its decree; and

   (b) the Court of Appeals treated the trial court's preference for the less effective plan, not as a legal conclusion subject to plenary review, but as a factual finding which was presumptively correct under F.R. Civ. P. 52.

3. Did the courts below commit unconstitutional error in settling for the less effective desegregation plan because of white community hostility to "the greatest possible degree of actual desegregation?"

Constitutional and Statutory Provisions Involved

This case involves the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves Rule 52(a) of the Federal Rules of Civil Procedure, which provides, in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. . . .

Statement

History of the Litigation

The complaint in this case, seeking desegregation of the Memphis, Tennessee public schools, was filed March 31, 1960. On appeal from a district court order upholding the Tennessee Pupil Assignment Law as an appropriate remedy for Memphis' admittedly unconstitutional dual school system, the Sixth Circuit reversed with directions to disestablish the segregated system. *Northcross* v. *Board of Educ. of*

Memphis, 302 F.2d 818 (6th Cir.), *cert. denied,* 370 U.S. 944 (1962).

On remand the district court approved a stair-step, grade-a-year plan utilizing geographic zoning and minority-to-majority transfers. The present petitioners appealed, and the Sixth Circuit accelerated the grade-a-year approach, invalidated the minority-to-majority transfer,[1] and, finding substantial evidence of racial gerrymandering, directed the district court to give close scrutiny to all attendance zone lines. *Northcross* v. *Board of Educ. of Memphis,* 333 F.2d 661 (6th Cir. 1964).

Following the filing of a motion for further relief by the present petitioners on May 13, 1966, the school board submitted a modified plan incorporating minimal zone changes and permitting "free transfers," [2] which was approved by the district court without hearing on July 29, 1966. The court made no ruling on petitioners' motion for further relief.

After this Court's decisions in *Green* v. *County School Bd.,* 391 U.S. 430 (1968), *Raney* v. *Board of Educ.,* 391 U.S. 443 (1968) and *Monroe* v. *Board of Comm'rs,* 391 U.S. 450 (1968), petitioners filed a second motion for further relief on July 26, 1968. The district court held several hearings and on May 15, 1969 issued a memorandum opinion (unreported) concluding that the state-imposed dual system had not been dismantled. The court ordered that faculty desegregation commence, established a 1969-70 goal of 20% minority teachers in each school, and directed the board to submit revised zone lines; but it declined to void the free-transfer provision or to enjoin additional school construc-

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[1] *See Goss* v. *Board of Educ. of Knoxville,* 373 U.S. 683 (1963). (1968).

[2] *See Monroe* v. *Board of Comm'rs of Jackson,* 391 U.S. 450

tion pending approval of new zones.[3] The Sixth Circuit declined to order further remedial steps but remanded the case for reconsideration by the district court after the revised attendance zones were drawn. *Northcross* v. *Board of Educ. of Memphis,* 420 F.2d 546 (1969).

Upon petitioners' subsequent motion for injunctive relief pending certiorari, the Sixth Circuit *sua sponte* declared Memphis to be a unitary school system, thereby seeking to distinguish this case from *Alexander* v. *Holmes County Bd. of Educ.,* 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Bd.,* 396 U.S. 226 (1969). *See Northcross* v. *Board of Educ. of Memphis,* 420 F.2d 548 (6th Cir. 1970). This Court granted certiorari and reversed the Sixth Circuit's holding that Memphis was a unitary system; it affirmed the remand with added instructions that the dual system in Memphis be promptly disestablished in accord with *Alexander* and *Carter. Northcross* v. *Board of Educ. of Memphis,* 397 U.S. 232 (1970).

After extensive proceedings on remand from this Court, the district court issued an opinion on May 1, 1970 which required further faculty desegregation and prior judicial approval of school construction or site acquisition proposals, eliminated the free-transfer provision, but rejected the use of contiguous and noncontiguous school pairing and pupil transportation to accomplish actual desegregation. *Northcross* v. *Board of Educ. of Memphis,* 312 F. Supp. 1150 (W.D. Tenn. 1970). On appeal, the Sixth Circuit remanded for reconsideration in light of the then recent decisions of this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1 (1971) and *Davis* v. *Board of School*

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[3] *See Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 20-21 (1971); *Calhoun* v. *Cook,* 430 F.2d 1174 (5th Cir. 1970); *Cisneros* v. *Corpus Christi Independent School Dist.,* 459 F.2d 13 (5th Cir. 1972).

Comm'rs, 402 U.S. 33 (1971). *Northcross* v. *Board of Educ. of Memphis,* 444 F.2d 1179 (6th Cir. 1971).[4]

The district court again conducted an extensive hearing and, in its decision (unreported) of December 10, 1971, held that one-race or virtually one-race schools in Memphis are vestiges of state-imposed segregation. The court directed the preparation and submission of alternate pupil desegregation plans, and in its opinion of April 20, 1972, 341 F. Supp. 583, directed implementation of the plan which accomplished the least desegregation ("Plan A").[5] By a divided vote, the Court of Appeals affirmed "Plan A" as an interim measure and remanded the case with directions to establish a fully unitary school system as promptly as possible. *Northcross* v. *Board of Educ. of Memphis,* 466 F.2d 890 (6th Cir.), *stay denied,* 409 U.S. 909 (1972), *cert. denied,* 410 U.S. 926 (1973), *vacated in part and remanded on other grounds,* 412 U.S. 427 (1973).[6]

By this petition, plaintiffs in this case seek review of the rulings by the courts below following that 1972 remand.

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[4] At the same time, the Court of Appeals denied rehearing of an earlier affirmance of certain school construction proposals. *Northcross* v. *Board of Educ. of Memphis,* 444 F.2d 1184 (6th Cir. 1971).

[5] This plan did require, for the first time, modest transportation of Memphis students to achieve desegregation and its effectuation was immediately stayed by a panel of the Sixth Circuit. *See Northcross* v. *Board of Educ. of Memphis,* 463 F.2d 329 (6th Cir. 1972). Following the subsequent panel decision on the merits, in which the stay was vacated, the district court conducted hearings and issued a decision on September 29, 1972 ordering the implementation of "Plan A" at the start of the second semester (in January, 1973).

[6] By order subsequent to its main decision, the Court of Appeals had denied a motion of petitioners for an award of costs and attorneys' fees in connection with the appeal. That order was vacated by this Court.

The District Court's Ruling and the Plan It Selected

In accordance with various district court orders, the school board designated a team of staff members to prepare a plan of desegregation. Of various alternative suggestions, the board ultimately determined to submit three alternate elementary and two alternate secondary proposals to the court,[7] with a recommendation that a combination of Plan II elementary and Plan II secondary[8] was preferred as the "least disruptive and least expensive plan."[9]

Plan II affects all of the formerly all-white schools in the system[10] but retains 25 all-black or virtually all-black

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[7] As the district court noted in its subsequent opinion (9a), the rejection by the board of an earlier team-prepared secondary plan ultimately resulted in the submission of more than one proposal to the court.

[8] The plans all had a variety of designations. Plan II elementary and Plan II secondary were generally treated as one combined alternative and Plan I secondary and Plan III elementary as another; the "Team" elementary plan was considered adaptable to either secondary plan. Since the petitioners supported combined plan I-III and the Board combined plan II (10a), the bulk of the evidence concerned these.

[9] At no time did the board ever announce educational or education related (e.g., time and distance of travel) reasons for its preference for Plan II, nor for its dislike of the alternative plans presented, although the board did direct its attorney to argue for the preferred plans. And at the hearing there was no uniformity of opinion among the board's staff members who testified: some staff-member witnesses preferred an elementary plan different from the board-selected plan, and others preferred a different secondary plan.

[10] Although, as the Sixth Circuit noted, Plan II (approved by the district court) "includes no all-white units" (3a), the plan does leave a considerable number of Memphis schools with predominantly white enrollments which are "substantially disproportionate" in the *Swann* sense. *See Medley* v. *School Bd. of Danville*, 482 F.2d 1061 (4th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3423 (Jan. 21, 1974). This is in large measure because 25 all-black schools were not included in pairings or clusterings with the

schools: 19 all-black elementary schools which are attended by about 14,000 students in grades 1-6 (40% of all black pupils in these grades), 4 junior high schools to which more than 4,500 (23% of all black) children in grades 7-9 are assigned, and 2 all-black high schools (Booker T. Washington and George Washington Carver) attended by nearly 3,000 black (20% of all black) high school pupils.[11] Plan I-III[12] projected desegregation of all schools in the system.[13]

Generally, both of the plans prepared by the board's team accomplish desegregation of the secondary grades by non-contiguous zoning,[14] although desegregation has also been

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formerly all-white facilities. Desegregation of the 25 remaining all-black schools, as sought by this Petition, will almost certainly also eliminate the disproportionately white schools. Plan I-III, supported below by petitioners, would have accomplished both objectives.

[11] The "Team" elementary plan also left 19 black elementary schools, although not all are the same schools which remain all black under Plan II; and some of the all-black schools in Plan II would be desegregated in the "Team" plan.

[12] See note 8 *supra*.

[13] The projected elementary school enrollments under Plan III ranged from a low of 36% black at one school to a high of 74% black at another, but with no remaining pattern of racial identity. In the secondary plan (Plan I) as drawn by the school staff, however, there emerged a clear pattern of continuing racial identifiability: most formerly all-black high schools were projected to be about 70% black and most of the all-white high schools were projected to be about 70% white. This resulted from the size of the non-contiguous zones established by the team (see note 14 *infra*) and the team's approach to school capacities. Petitioners accordingly proposed modifications of Plan I increasing the degree of desegregation, generally by enlarging the non-contiguous zones within the framework selected by the board's team.

[14] For example, a white junior high school is designated to exchange a specified number of students with a black junior high school; using the pupil locator map, the board's staff then defines a segment of each school's prior attendance zone which contains approximately the desired number of pupils; each segment becomes part of the other school's attendance area. At the time of the

accomplished (under both "Plan A" and Plans I and II) by the rearrangement of contiguous zones. The primary desegregation technique utilized in the elementary plans, on the other hand, is pairing and clustering (usually with grade reorganization) of both contiguous and noncontiguous zones.[15] Under Plan II the longest bus ride is 45 minutes at both elementary and secondary levels; about 44% of the 40,000 students projected to be transported would spend between 31 and 45 minutes en route. Plan I-III projected the transportation of approximately 48,000[16] students, with the longest bus ride being 52 minutes, using expressway routes;[17] most students bused under this plan would be en route between 31 and 45 minutes.

The total projected annual cost of Plan II was $1,683,897 or 1.6% of the board's annual budget of approximately

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hearing on the plans, the team had not drawn the specific noncontiguous ("satellite") zones, but had merely approximated the desired numbers of students proposed for exchange between designated schools (11a-12a). These were submitted prior to entry of the trial court's judgment but following issuance of its opinion selecting the plan to be thus more fully developed for actual implementation.

[15] For example, three elementary (grades 1-6) schools and their zones might be combined ("clustered") into a single attendance area, with one school designated to house all students in grades 1-2, another to house all pupils in grades 3-4, and the third to accommodate all pupils in grades 5-6, residing within the enlarged attendance zone.

[16] 57,000 students, if petitioners' proposed modifications to Plan I (see note 13 *supra*) were effectuated (17a-18a).

[17] For some reason, the district court perceived that "[t]he defendants advocate not using the expressways . . . ." (17a). The fact is, however, that at the time of the hearing the board had no position on the matter, pending further discussions with its transportation contractor. The decision was made ultimately to use the expressways, and the plan (Plan II) presently in operation is being implemented by travelling on the expressways whenever feasible.

$104 million. The projected cost of Plan I-III was $2,793,911 or 2.6% of the budget.

At the three-day hearing which commenced April 18, 1973, the plans were presented by way of documentary and map exhibits, with explanatory testimony by three members of the board's team. These witnesses testified generally that, although each accomplished less desegregation than Plan III, they preferred either Plan II or the "Team" elementary plan because the latter two required shorter transportation times and distances and would cost less.

None of the team members was willing to state that any of the Plan III times and distances presented a health or safety hazard or would impinge on existing educational programs.[18] The team members were positive only in their testimony, in the words of one, that Plan III "would be less palatable to the citizenry." (4/18/73 Tr. 60). The Superintendent of Schools, who also testified, stated that he was not opposed to any of the elementary and secondary plans "personally or professionally" (4/18/73 Tr. 489), although he preferred the less expensive plans with less pupil transportation.[19]

The (white) team member who demonstrated the most detailed knowledge of all of the plans, testified that "if we are to effectively desegregate every [elementary] school . . . , I don't know of anyone who could draft any plan that

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[18] The board's educational psychologist testified that shorter times and distances of travel for elementary children were preferable, but he identified no time or distance in any of the plans as being educationally unsound or hazardous. The headmaster of one of Memphis' traditional, more prestigious private schools testified (by stipulated affidavit) that his school daily transported children "in the general range of three years to 18 years of age" over routes consuming from 55 to 75 minutes (4/18/73 Tr. 439-41).

[19] The Superintendent also testified about the extent of "white flight" after implementation of the interim "Plan A," and expressed his desire for a final, permanent plan.

does a better job as far as considering times and distances and these kind of things [than does Plan III]." (4/18/73 Tr. 230-31).

As to the secondary plans (Plan I and Plan II), no witness stated any serious objection to Plan I, which proposed desegregation of all secondary units. One team member stated a clear preference for Plan I because it *did* achieve complete secondary integration and because the times and distances were no greater than those required by the board-preferred elementary plan (Plan II) and were less than those in the "Team" elementary plan.[20]

Petitioners' expert witness, Dr. Gordon Foster, Director of the Title IV Desegregation Center at the University of Miami, concluded the testimony of witnesses pertaining to the plans by urging adoption of the board's elementary and secondary proposals (Plan I-III) which would accomplish the goal of complete desegregation. He stated that the travel times and distances in Plan I-III compared favorably with those of desegregation plans then in effect in other, geographically larger urban school systems throughout the country,[21] and that none of the proposed times or distances posed health, safety, or educational problems.

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[20] Subject to minor modifications, any of the elementary plans could be combined with either of the secondary plans (4/18/73 Tr. 564-66).

[21] For example, Dr. Foster testified that the plans in effect in Nashville-Davidson County, Tennessee (*Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972)) and Charlotte-Mecklenburg County, North Carolina (*Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)), both of which are about twice the geographic size of the Memphis system, required times and distances as great or greater than those projected for Plan I-III. Dr. Foster also favorably compared Plan I-III with plans which are in effect in such school systems as Tampa and Jacksonville, Florida and Mobile, Alabama, all of which are about three times the size of the Memphis system.

The district court filed its memorandum decision on the plans presented May 3, 1973 (7a-32a), with implementing judgments entered May 17, 1973 and July 26, 1973 (33a-38a). As discussed in greater detail *infra*, the court generally made findings with regard to such uncontroverted, documented facts as the times and distances involved in each plan, the numbers of students projected to be transported under each plan, the projected annual cost of each plan,[22] and the desegregation techniques utilized in each of the plans, etc. (11a-18a). The district court's opinion then summarizes the reasons for the team's preference for Plan II:

> The lesser degree of desegregation in combined Plan II is based primarily upon four factors pertaining to effectiveness, feasibility and pedigogical soundness. Those factors are time and distance travelled on buses, cost of transportation, preservation of desegregation already accomplished, and adaptability.

(18a-19a). The court's explanation of these factors, reduced to its essence, is as follows: (1) the board's staff witnesses thought "that transportation times in the neighborhood not more than 30 to 40 minutes are preferable to the welfare of elementary pupils" (19a);[23] (2) "the longer trips for the buses significantly increase the per pupil cost" and "[d]ue to the long history of racial discrimination in this city and its resulting racial hostility, experience has

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[22] In connection with costs, the court neglects to note that the system is entitled to receive state reimbursement for annual pupil transportation operating expenses, equivalent to approximately 30%-40% of its costs.

[23] The district court's approval of Plan II, supported by the Memphis Board, despite the fact that pupils would under that plan be transported up to 45 minutes, indicates that the court did not view the "30 to 40" minute testimony as establishing a maximum safe and healthful bus ride for school children.

shown that extensive preparation is necessary to effectively bring the students of different races together. . . . [This] costs money" (19a, 20a); (3) although the team had no reservations about "undoing" existing desegregation arrangements wherever it "was considered to be educationally preferable," the court had previously approved "the practice of preserving desegregated schools which have accomplished desegregation voluntarily" (20a);[24] and (4) school desegregation causes a number of white students to refuse "to attend school with black students, particularly at black schools, result[ing] in their leaving the system for private schools or moving to unaffected areas" (23a).[25]

The district court made no finding in its opinion that (a) the projected times or distances of pupil transportation under any of the plans were likely to be injurious to the health or safety of any child, of any age; or that (b) the transportation required under any of the plans would interfere with the educational process or with any educational programs of the Memphis system; or that (c) the projected cost of the most expensive Plan I-III, equivalent to less than 3% of the board's overall budget, was beyond the

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[24] As noted above, Plan A ("preserved as much as possible" in Plan II (20a)) was not implemented voluntarily but under court order.

[25] Although the court earlier referred to "the expected unwillingness of white patrons to send their children to *those particular black schools* [not desegregated under Plan II] *in the light of the location and the distances involved* in the necessary exchange of white and black students" (21a) (emphasis supplied), the court supports its "white flight" findings by pointing to the example of two *contiguous* schools paired under Plan A (22a-23a). The evidence also demonstrated losses of white students from schools not even reached by Plan A. Thus race, not distance, is the relevant factor. This was confirmed by data submitted when the satellite zones for Plan II were furnished to the court (see note 13 *supra*), which revealed no pattern of higher white attrition rates related to the distances between paired schools.

means of the school system.[26] Nevertheless, after stating the *team's* reasons for preferring Plan II, the district court concludes:

> On the basis of the above *findings*, this Court concludes that implementation of the secondary Plan II and Elementary Plan II . . . will constitute [constitutional] compliance . . . even though the plans leave some all black schools.

(23a-24a) (emphasis supplied). Nowhere in its opinion does the court confront the undisputed fact that the plan selected permanently consigns over 21,000 black children to attendance at 25 state-created all-black schools.[27]

The Court of Appeals' Ruling

On December 4, 1973, the Court of Appeals for the Sixth Circuit affirmed the district court in a short, *per curiam* opinion. The Court of Appeals described the proceedings and plans briefly,[28] then held as follows:

> The District Court, sitting as trier of fact, reviewed the merits of the alternative plans submitted by appellee before reaching its decision. That decision cannot be set aside unless clearly erroneous. Rule 52(a) Fed. R. Civ. P. In *Goss* v. *Board of Education of*

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[26] *Cf. Brewer* v. *School Bd. of Norfolk*, 456 F.2d 943, 947 n. 6 (4th Cir.), *cert. denied*, 406 U.S. 905 (1972).

[27] The court had earlier found, on December 10, 1971, that the one-race black schools in Memphis were the result of past discriminatory acts of the school officials. *See* 466 F.2d, at 893. *Compare Swann*, 402 U.S., at 26.

[28] Like the district court, however, the Sixth Circuit was reluctant to consider the extensive segregation validated by its judgment; its language that "Plan II leaves *a number* of black students in all-black or predominantly black schools" (4a) (emphasis supplied) hardly reflects the reality that there are over 21,000 such black students—nearly a third of all black pupils in Memphis.

Knoxville, 483 F.2d 1044, 1047 (6th Cir. 1973), this Court, faced with a similar question, stated that "An appellate court simply cannot violate this settled principle of our jurisprudence, no matter how desirable a particular result may appear to be." We conclude that the District Court's choice of Plan II was not clearly erroneous and must, therefore, be upheld.

. . .

The District Court's analysis of the proposed alternatives was both thoughtful and thorough, and we do not find the conclusions reached to be clearly erroneous. As we stated in *Goss, supra,* at 1047, "The experienced District Judge who has lived with this case from its inception analyzed the evidence in great detail. His findings are supported by substantial evidence and are not clearly erroneous." The above statement has equal validity here. The May 3, 1973 Memorandum Decision of the District Court ordering the implementation of Plan II and designated Plan Z is hereby affirmed. [4a, 6a]

REASONS FOR GRANTING THE WRIT

I.

The Decisions Below, Forever Assigning Over 21,000 Black Students To All-Black Memphis Schools, Conflict With *Swann* and *Davis*, And Rulings Of Other Courts Of Appeals, Because There Was No Finding, Or Showing On This Record, That Greater Desegregation Is Impracticable Or Would Cause Educational Harm Or Danger To Health Or Safety.

A. *Swann* Requires That District Courts Make Findings To Support Their Desegregation Decrees.

This action to desegregate the public schools of Memphis, Tennessee was filed nearly fourteen years ago. While it was pending before the Sixth Circuit on one of many appeals seeking to move the system closer to actual desegregation, this Court issued its landmark rulings attempting to define, with greater clarity, the remedial obligations of formerly dual school districts, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Comm'rs of Mobile*, 402 U.S. 33 (1971). The Memphis case was remanded to the trial court for adoption of a new desegregation plan and further proceedings in conformity with *Swann* and *Davis*, 444 F.2d 1179 (6th Cir. 1971).

Now, many hearings and two appeals later, plaintiff black children have recourse only to this Court for vindication of the constitutional rights they sought to protect 14 years ago when this suit was filed. Under the decree approved below, nearly a third of all black pupils in Memphis (more than 21,000 black children) are assigned—permanently and finally—to 25 all-black schools. Many will attend only all-black schools throughout their twelve-

grade public education. Far from being in conformity with this Court's interpretations of the Fourteenth Amendment in *Swann* and *Davis*, this result is a grotesque distortion of the *Swann* language and intent, and is without justification either on the record or in the findings of the trial court upon which the Court of Appeals claimed it relied.

Swann directed school boards and district courts to "make every effort to achieve the greatest possible degree of actual desegregation. . . ." 402 U.S., at 26. It specifically approved the use of pupil transportation, together with other techniques such as pairing, grouping, and grade restructuring of schools, as permissible tools to bring about the constitutionally required result of actual school desegregation. And it suggested, if it did not explicitly state,[29] that valid grounds for objecting to desegregation plans using pupil busing exist only when "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." 402 U.S., at 30-31.

Swann also emphasized that exact racial balance among the schools of a desegregating district was not required, although efforts should be made to avoid schools of "substantially disproportionate" racial composition (when compared to the system-wide population characteristics). 402 U.S., at 26. Plans proposing the continued existence of one-race schools, the Court held, were presumptively insufficient and school officials bear a heavy burden of justification with respect to such plans. *Ibid.*

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[29] We respectfully suggest that the supposed inability of some school districts or school officials to grasp the meaning of this Court's directions in *Swann* is akin to the same parties' "inability" to comprehend the point of the *Brown* decisions and their progeny. *See Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232, 236-37 (1970) (Mr. Chief Justice Burger, concurring).

And while *Swann* also cautioned against a mechanical approach to desegregation problems, noting for example that the continued "existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," *ibid.*, it is very clear that the Court did not intend thereby to validate continued massive school segregation. *Cf. Kelly* v. *Guinn*, 456 F.2d 100, 109-10 (9th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973). The Court of Appeals itself recognized in this very case, that

> this language,—obviously designed to ensure that tolerances are allowed for practical problems of desegregation where an otherwise effective plan for dismantlement of the dual system has been adopted—was [not] intended to blind the courts to the simple reality that a formerly de jure segregated system has not dismantled its dual system when 87% of its black students still attend one-race schools.

Northcross v. *Board of Educ. of Memphis*, 466 F.2d 890, 893 (6th Cir. 1972).

And yet, after the latest round of district court proceedings, in which the court was presented with two alternative desegregation plans devised by Memphis school administrators, one of which would have desegregated all public schools and the other one of which leaves 21,000 black students assigned to completely segregated facilities forever, the district court chose the less effective plan without making *any* of the findings which might conceivably justify such a decision under *Swann* and *Davis*.[30] *Compare Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968).

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[30] See pp. 12-14 *supra*.

We repeat again that nowhere in its opinion does the district court make findings (a) that the projected times or distances of pupil transportation under any of the plans were likely to be injurious to the health or safety of any child, of any age; or (b) that the transportation required under any of the plans would interfere with the educational process or with any educational programs of the Memphis system; or (c) that the projected cost of the most expensive Plan I-III, equivalent to less than 3% of the board's overall budget, was beyond the means of the school system. It is true that the district court's opinion details many of the characteristics of the competing plans before the court: the projected results of each, the bus rides involved. costs, etc. (11a-18a). And we would not dispute the veracity of findings to the effect that the plan plaintiffs preferred, which would completely desegregate the Memphis system, would have involved greater expenditures of money and required somewhat longer bus rides for some pupils, than the plan which the district court approved. But it is critical that the district court specifically and deliberately failed to make *those factual findings which could justify a lesser degree of desegregation* than that which would be accomplished by the plan plaintiffs supported.

The district court's error is not cured by its lengthy summary of the four factors considered by the board's desegregation team to support its preference for Plan II (18a-23a), even treating the discussion as "findings." We argue *infra*, pp. 30-33, that the district court improperly concerned itself with the "white flight" from the system which it presumed would occur if Memphis were required to desegregate completely. The impropriety of such consideration has been established at least since *Cooper* v. *Aaron*, 358 U.S. 1 (1958) and was more recently reit-

erated in *Monroe* v. *Board of Comm'rs,* 391 U.S. 450 (1968) and *United States* v. *Scotland Neck City Bd. of Educ.,* 407 U.S. 484 (1972). Any ruling based even in part upon such considerations, which fails to "achieve the greatest possible degree of actual desegregation," was erroneous. The other "factors" discussed by the district court are each likewise insufficient as a matter of law. The team sought, for example, to preserve unchanged so much of the 1972-73 plan ("Plan A") as possible (20a). But that interim scheme was recognized as insufficient by both the district court and the Sixth Circuit in 1972. *See* 466 F.2d, at 895. To accept Plan II because it "preserves Plan A" is to build into the decree the same ineffectiveness which characterized the 1972 plan. And vaguely expressed concerns for "time and distance" or "cost" are simply no substitute for the necessary findings that Plan I-III would have been beyond the financial abilities of the district or would have endangered the health of students or the maintenance of the educational program because of inordinately long bus rides. Thus, while the district court repeated some of the contentions upon which the school board sought to justify "its preference for an apparently less effective method," *Green* v. *County School Bd., supra,* 391 U.S., at 439, it made no independent findings of its own about any objectionable features of either desegregation plan presented to it. Its opinion simply fails to elucidate any rational basis upon which the court selected one plan over another. "The observations made in the course of [the opinion] are not, in any proper sense, findings of fact upon the vital issues in the case. Statements of ultimate fact are mingled with arguments and extraneous views and advice." *Daniel* v. *Washington County Bd. of Educ.,* 488 F.2d 82 (5th Cir. 1973). The opinion does not set forth grounds for selecting the less effective of the plans before the district court; it contains nothing more

than an unenlightening melange of excerpts from *Swann* and *Davis*.[31]

We respectfully suggest that the entire "holding" of the district court fails even to begin to explain why that court declined to order the complete desegregation of the Memphis, Tennessee public schools. Putting aside any other measure of effectiveness, one startling difference between the plans considered by the district court is the retention, in the plan approved by the court, of 25 all-black schools enrolling more than 21,000 black students. The proposal supported by the plaintiffs would have desegregated each one of those schools by pairing or clustering it with other Memphis system facilities. The pupil transportation times which would have been required thereunder differ with respect to each pair or cluster. Yet nowhere does the District Court make the kind of detailed, specific findings about each such proposal which we submit is required by *Swann*, *Davis*, and such lower court decisions as those discussed in §B, *infra* pp. 22-24.

The failure of the trial court to make such findings, no matter what the nature of the litigation, violates F.R. Civ. P. 52(a) and constitutes reversible error. *E.g.*, *Mayo* v. *Lakeland Highlands Co.*, 309 U.S. 310 (1940). Without such findings, the judgment of the trial court evidences nothing greater than its unreasoned preference for less than complete constitutional compliance, exactly what *Swann* was intended to avoid. While that decision reaffirms the "broad remedial discretion" of the district courts in school desegregation cases, it also establishes standards for the exercise of that discretion. Although the scope of

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[31] The entire "holding" of the district court is found *infra*, pp. 23a-26a, commencing "On the basis of the above findings," and concluding that if Plan II meets its projections, "the system will be unitary as that term is used in the controlling opinions."

appellate review in equity cases may be narrow, *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973), the very existence of discretionary power implies the establishment of standards by which its appropriate use may be judged. *Cf.*, *e.g.*, *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (No. 14,692d, 1807) (Marshall, C.J.); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Such standards *were* announced by this Court in *Swann* and *Davis*. But the failure of the district court to elucidate the specific facts leading to its determination to select the less effective plan leaves totally unsupported its legal conclusion that its decree will create a "unitary school system" (26a).

B. The Ruling Below Conflicts With Decisions of Other Courts of Appeals Requiring Such Findings.

The decision below is typical of the Sixth Circuit's brief, *per curiam* opinions (which often rely upon F.R. Civ. P. 52(a)) sanctioning continued segregation of large numbers of students by district court decrees designed to end the dual system. *See, e.g., Robinson* v. *Shelby County Bd. of Educ.*, 467 F.2d 1187 (6th Cir. 1972); *Goss* v. *Board of Educ. of Knoxville*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3423 (Jan. 21, 1974); *Mapp* v. *Board of Educ. of Chattanooga*, 477 F.2d 851 (6th Cir.), *cert. denied*, 42 U.S.L.W. 3290 (November 12, 1973). Other Courts of Appeals, however, have required that any departures from thorough, system-wide desegregation be rigorously justified by explicit factual findings. For example, in *Adams* v. *School Dist. No. 5, Orangeburg*, 444 F.2d 99 (4th Cir. 1471), several school desegregation actions were remanded to the district courts with these instructions:

> If the district court approves a plan achieving less actual desegregation than would be achieved under an

> alternate proposed plan it shall find facts that are thought to make impracticable the achieving of a greater degree of integration, especially if there remain any schools all or predominantly of one race.

Similarly, in *Thompson* v. *School Bd. of Newport News*, 465 F.2d 83, 86, 89 (4th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973), where the district court had accepted a plan which completely failed to desegregate the first three grades of the system, because

> . . . [w]hile it is not supported by any testimony in this case, I am old-fashioned enough to think that [neighborhood schools are educationally important for children starting school],

the Court of Appeals remanded the case, stating that

> [while] the assignment of the primary grades to neighborhood schools is not *per se* unacceptable, such assignment must rest on specific findings of fact establishing that, on account of ages of the pupils and difficulties of transportation, no other plan affording greater integration is practical. And, where there is insufficient basis for such conclusion, zoning is impermissible.

In the Fifth Circuit, as well, desegregation decrees receive careful scrutiny if they leave one-race schools. *See, e.g., Bivins* v. *Board of Educ. of Bibb County*, 460 F.2d 430 (5th Cir. 1972); *Boykins* v. *Fairfield City Bd. of Educ.*, 457 F.2d 1091 (5th Cir. 1972). And the Fifth Circuit has explicitly recognized the importance of factual findings to the appellate review process:

> . . . The law requires the court to implement the most effective plan for unitizing a school system. Wright

> v. Council of the City of Emporia, 1972, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51. Although we are hesitant, from our appellate detachment, to require a plan which has been rejected by the District Court, even though we have repeatedly ordered the implementation of HEW plans immediately when less-than-effective alternative plans were ac pted by a lower court, e.g., Singleton v. Jackson Municipal Separate School District, 5 Cir., 1970, 426 F.2d 1364, 1369 (*Singleton IV*); Banks v. Claiborne Parish School Board, 5 Cir., 1970, 425 F.2d 1040, this is one in which we think it appropriate to direct the District Court after such factual hearings and data accumulation as needed to reassess the current factual situation in Rankin County and report to this Court by November 1, 1973, what measures it believes should be adopted to rectify the problems. The Court shall furnish explicit reasons for its actions and shall enter detailed findings of fact and conclusions of law with respect to the assignment of pupils in Rankin County.

Adams v. *Rankin County Bd. of Educ.*, 485 F.2d 324 (5th Cir. 1973). Soo, too, related decisions such as those to close black schools must be justified by factual findings at the trial court level. *E.g., Gordon* v. *Jefferson Davis Parish School Bd.*, 446 F.2d 266 (5th Cir. 1971); *Haney* v. *County Bd. of Educ.*, 429 F.2d 364, 372 (8th Cir. 1970).

Review is merited to resolve the conflict among the Courts of Appeals in their approach to school desegregation cases, which has had (and can only have) the effect of making the standards and results under the Fourteenth Amendment different, in Tennessee, Kentucky, Ohio and Michigan, from those declared by this Court and applied by other Courts of Appeals.

The error of the district court in this case is manifest; the incompatability of its opinion with the approach to school desegregation cases enunciated in *Swann* and followed by other Courts of Appeals is apparent. The harshness of the decree, assigning 21,000 black students to all-black schools, is striking. Such results, halting or even undoing the progress which has been steadily made since *Brown*, may become all too common if district courts need do no more to support their decisions than to announce that the plans they select comply with the Fourteenth Amendment, and Courts of Appeals are thereby rendered incapable of intelligently reviewing the exercise of the district courts' remedial discretion.

This case, involving the twelfth largest school system in the nation, and one which has been so long litigated, provides an extremely appropriate opportunity for this Court, through the exercise of its certiorari jurisdiction, to thwart any such trend while finally according constitutional rights to Memphis' black children.

II.

The Court Of Appeals Never Measured The District Court's Decree Against The Requirements Of *Swann* Because It Erroneously Treated The District Court's Entire Decision As A Factual Finding Which Was Presumptively Correct Under F.R. Civ. P. 52(a).

In its May 17, 1973 memorandum decision, the trial court concluded that "if the plans are effective [as projected], the system will be unitary as the term is used in the controlling opinions [of the Supreme Court]." As noted in the Statement, *supra*, the Sixth Circuit rested its affirmance of that decision upon F.R. Civ. P. 52(a):

> The District Court, sitting as trier of fact, reviewed the merits of the alternative plans submitted by appellee before reaching its decision. *That decision* cannot be set aside unless clearly erroneous. Rule 52(a) Fed. R. Civ. P. . . . We conclude that the District Court's *choice of Plan II* was not clearly erroneous and must, therefore, be upheld.

(4a) (emphasis supplied). As described in the Statement, however, the only finding made by the trial court which related to matters as to which the parties were in dispute, was its totally conclusory finding that implementation of Plan II will provide for a unitary school system in Memphis. At best, that is a finding of "ultimate fact," resulting from the district court's application of legal standards to undisputed facts,[32] which should have been given plenary review by the Court of Appeals free of any Rule 52 constraints.[33]

The Court of Appeals treated the district court's bald legal conclusion as to the constitutional sufficiency of Plan II as a "finding of fact" to be overturned only if "clearly

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[32] *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944).

[33] The Court of Appeals failed even to make a convincing case for affirmance under Rule 52. It does not discuss any of the evidence upon which it bases its summary holding that "we do not find the conclusions reached [by the district court] to be clearly erroneous" (6a). To the extent that the Court of Appeals believed it was doing so in this passage,

> The clearest insight into the weight the District Court gave to the practical considerations recommended by *Swan* [sic] and *Davis* is found in the following passage from the Memorandum Decision: [quotation from district court opinion omitted]

(5a) it failed to realize that the passage in the district court's opinion, which it then quoted, described the team's reasons for preferring Plan II rather than indicated the district court's own holding.

erroneous." In so doing, it overlooked this Court's holdings as to the proper application of the "clearly erroneous" standard. Rule 52(a) merely adopted prevailing federal equity practice under which

> the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however.

United States v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The rule does not apply to review of cases in which the evidence is partly oral and partly documentary or undisputed. *See United States* v. *Parke Davis & Co.*, 362 U.S. 29, 43-44 (1960); *Great A&P Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 153-154 (1950); *cf. Orvis* v. *Higgins*, 180 F.2d 537 (2d Cir. 1950), *cert. denied*, 340 U.S. 810 (1951). In such cases the appellate court's review is plenary and it may itself apply the correct law to those facts not subject to credibility determinations.

This case was essentially a "paper case," [34] as the Court of Appeals noted:

> The evidence consisted mainly of projected attendance, transportation and cost figures for the various plans, and the testimony of team members and other experts.

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[34] *See United States* v. *General Motors Corp.*, 384 U.S. 127, 142 n. 16 (1966), where this Court stated:

> . . . the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) . . . plays only a restricted role here. This was essentially a paper case. It did not unfold by the testimony of "live" witnesses.

(4a). See pp. 10-11 *supra*. As set forth above, there is no dispute as to the matter to which the witnesses addressed themselves in their testimony, i.e., the fact that complete desegregation of the Memphis schools would require somewhat greater effort and expense than would the partial desegregation accomplished by Plan II. Thus, the Court of Appeals was free to draw its own inferences and conclusions from the undisputed evidence as to which desegregation plan offers "the greatest possible degree of actual desegregation;" indeed, it was obligated to do so. *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969). Given the state of the evidence, establishing without dispute that Plan I-III can be implemented in Memphis, the Court of Appeals would have had to reverse the judgment of the district court if it had made that inquiry.

Treatment of the district court's choice of plan as a factual finding,[35] however, effectively denied plaintiffs the opportunity to have the Court of Appeals pass upon the district court's interpretation of *Swann* and *Davis*.[36]

The Court of Appeals' affirmance of the district court, therefore, even though it purported to rely primarily upon factual findings of the trial judge, does not insulate the merits of this case from review here. As Mr. Justice Frankfurter put it, in *United States* v. *John J. Felin and Co.*, 334 U.S. 624, 639-40 (1948):

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[35] In *Swann* terms, the effect of the Court of Appeals' approach was to convert the district court's legal conclusion that Plan II meets the requirements of the Constitution into a factual determination that the additional transportation times and distances under Plan I-III would be harmful to health, etc. But that is not what the district court found at all. See pp. 11-14 *supra*. The Court of Appeals' error is akin to that in 1970, *see Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232, 235 (1970).

[36] See note 33 *supra*.

> Where the conclusion is a "composite of fact and law", . . . this Court may certainly hold that as a matter of law the findings are erroneous. . . . Similarly findings concurred in by two courts do not control the decision here where "facts and their constitutional significance are too closely connected" and "the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied."

Accord, Neil v. *Biggers*, 409 U.S. 188, 193 n.3 (1972); *Keyes* v. *School Dist. No. 1, Denver*, 413 U.S. 189, 198 n.9 (1973). Upon review of this case, therefore, this Court is free to look (as the Court of Appeals should have looked) to the record

> not to contradict the trial court's findings of *fact*, as distinguished from its conclusory "findings," but to supplement the court's factual findings and to assist . . . in determining whether they support the court's ultimate legal conclusion . . .[37]

that a unitary school system exists where one-third of all black students, numbering more than 21,000 children, are segregated in 25 all-black Memphis, Tennessee schools.

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[37] *United States* v. *General Motors Corp.*, *supra*, 384 U.S., at 142 n. 16.

III.

The Decisions Below Were Based Upon Constitutionally Impermissible Considerations Of White Community Hostility To Desegregation.

Throughout the district court's opinion, characterized as "thoughtful and thorough" by the Court of Appeals (a), runs the theme of white resistance to constitutionally required desegregation in Memphis. Virtually the only "factual findings" made by the district court concern the relationship between the desegregation previously implemented in Memphis (Plan A) and the withdrawal of white students from the city's public schools (20a-23a).[38] The point is made rather archly by the district court's observation—unsupported by the facts of record [39] that

> a system cannot effectively desegregate by the practice of involuntarily assigning members of the opposite race to certain schools if there are not sufficient members of the white race available to assign.

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[38] As we observed earlier (see note 25 *supra*), the evidence refutes any interpretation of the district court's finding as being that Plan A resulted in the withdrawal of white students because of time and distance, rather than racial, considerations. The district court thus had no basis upon which to predict that any additional white withdrawal following the implementation of further desegregation would be greater if plans involving more transportation, rather than less, were selected. The issue of concern to the district court was that presented by the school board and the team: white resistance to desegregation, and not to particular times and distances.

[39] Projections of the anticipated further white withdrawal under either Plan II or Plan I-III were prepared by the school system's research department and were introduced into the record when the defined satellite zones (see notes 13, 25 *supra*) were proposed for Plan II. These indicated that under either plan, there would be "sufficient members of the white race" to desegregate the schools. In fact, Plan I-III was projected to lead to the withdrawal of only 1400 more white students than Plan II—although the gain was achieved at the expense of 21,000 segregated black children. (This year's attendance data indicates the board's projection of white withdrawal under Plan II was at least 95% accurate.)

(21a). The district court seems to have overlooked the fact, however, that a system cannot effectively desegregate by rejecting a feasible, comprehensive plan and making the conscious determination to leave 21,000 black students in all-black schools.[40] This unnecessary compromising of plaintiffs' constitutional rights in the name of "practical recognition of white sentiment," concurred in by the Court of Appeals, is but the latest in the long series of half-measures of judicial relief which have characterized this protracted litigation. It recalls only too well the words of John W. Davis before this Court in 1953: ". . . [T]he best is often the enemy of the good." L. Friedman, ed., ARGUMENT 217 (1969). That advice was rejected then, and only by affirmatively rejecting it again may the integrity of the Fourteenth Amendment be maintained.

The unconditional illegality of this consideration as a criterion for selection among competing desegregation plans has been long established. *E.g.*, *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Monroe* v. *Board of Comm'rs*, 391 U.S. 450 (1968); *cf. Buchanan* v. *Warley*, 245 U.S. 60 (1917). Just two Terms ago, the point was eloquently reiterated by this Court in *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490-91 (1972):

> The primary argument made by the respondents in support of Chapter 31 is that the separation of the Scotland Neck schools from those of Halifax County was necessary to avoid "white flight" by Scotland Neck residents into private schools that would follow complete dismantling of the dual school system. Supple-

[40] To paraphrase slightly the Court's opinion in *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 468 (1972):

> The District Court, with its responsibility to provide an effective remedy for segregation in the entire [city] system, could not properly allow the city to make . . . part of that system more attractive where such a result would be accomplished at the expense of the children remaining in the [other, all-black part of the system].

> mental affidavits were submitted to the Court of Appeals documenting the degree to which the system has undergone a loss of students since the unitary school plan took effect in the fall of 1970 [footnote omitted]. But while this development may be cause for deep concern to the respondents. it cannot, as the Court of Appeals recognized, be accepted as a reason for achieving anything less than complete uprooting of the dual public school system. See Monroe v. Board of Commissioners, 391 U.S. 450, 459, 20 L.Ed.2d 733, 739, 88 S.Ct. 1700.

Rather than incorporating the racial argument into its treatment of the case, the district court should have realized that this explicitly racial justification put forward by the school board required it to give even less credence to the weak "educational" factors voiced to support the board's preferred plan:

> . . . And where a school board offers non-racial justifications for a plan that is less effective than other alternatives for dismantling a dual school system, a demonstrated racial purpose may be taken into consideration in determining the weight to be given to the proffered justification. Cf. Green, supra, at 439, 20 L.ed.2d at 724.

Wright v. *Council of the City of Emporia*, 407 U.S. 451, 461 (1972).[41]

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[41] This is not to suggest that a district court may never take "white flight" into account in picking among profferred desegregation remedies in a school case. It *is* impermissible as a matter of law to seek to justify otherwise alterable segregation by predictions of white flight. On the other hand, given two desegregation plans effective "on paper," but one of which can predictably be anticipated to result in greater white flight than the other, a court could properly select the plan to minimize it. *See Wright* v. *Council of the City of Emporia, supra*, 407 U.S., at 464. Thus, had the board's statistical studies shown that Plan III would for some reason result in greater flight than an alternative plan which

While it may seem somewhat incredible that, after the clear message of *Cooper, Monroe* and *Scotland Neck,* courts of the United States are continuing to act upon racially based white flight arguments, that is one of the explicit grounds of decision below. Quite apart from the enormous numbers of black students who stand to lose, forever, their chance to enjoy the promise of *Brown,* then, this conscious abandonment of the Fourteenth Amendment to popular hostility requires this Court's corrective mandate.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the writ of certiorari be granted.

Respectfully submitted,

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also desegregated all schools effectively (see notes 25, 39, *supra*), the district court probably would have abused its discretion in failing to require adoption of the plan which both desegregated the system and minimized flight.

APPENDIX

Opinion of the Court of Appeals

Nos. 73-1667 and 73-1954

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEBORAH A. NORTHCROSS, ET AL.,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL., CITY OF MEMPHIS, ET AL.,

Defendants-Appellees.

DEBORAH A. NORTHCROSS, ET AL.,

Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Decided and filed December 4, 1973

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

Per Curiam. This appeal was perfected from the Memorandum Decision and order handed down by the United

States District Court for the Western District of Tennessee on May 3, 1973, ordering the implementation of a plan intended to complete the desegregation process in Memphis. Appellants assert that the plan approved by the District Court does not achieve the degree of desegregation demanded by the Constitution and recent Supreme Court cases.

The history of this case is long and involved and need not be recounted here. For its history see the opinions of this Court in *Northcross* v. *Board of Education of Memphis City Schools,* 302 F.2d 618 (6th Cir. 1962); 333 F.2d 661 (6th Cir. 1964); 444 F.2d 1179 (6th Cir. 1971); 466 F.2d 890 (6th Cir. 1972). In the latter opinion we ordered the implementation of an interim desegregation plan and directed the District Court to "prepare a definite timetable providing for the establishment of a fully unitary school system. . . ." *Northcross, supra,* 466 F.2d at 895. On remand, the District Court ordered that the interim plan, Plan A, be put into effect for the Spring semester of 1973. Appellee carried out this order, necessitating extensive student and faculty reassignments and equipment transfers. In addition, the District Court directed the Board of Education to prepare a further plan for desegregation designed to establish a fully unitary system.

The appellee created a bi-racial "Team" consisting of staff members to handle the task of drawing a new plan. Instead of proposing a single solution, the Team submitted a series of alternative plans to the District Court. The trial court conducted hearing on the various proposals, selected one of the Team's plans, and ordered its implementation for the Fall semester of 1973. Expressing his desire for an end to this litigation, the District Judge

designated the effort "Plan Z." It is from the decision to adopt Plan Z that appellants bring this appeal.

The appellee's desegregation Team submitted two sets of alternative plans. Plan I and Plan III constitute one total plan, and will hereinafter be referred to as Plan I-III. Plan II (elementary) and Plan II (secondary) taken together make up one plan, and will hereinafter be simply Plan II. In addition, appellants submitted a modified version of Plan III, and the Team suggested a possible variation of Plan II (elementary).

At the elementary level Plan I-III would provide for complete desegregation of every attendance unit. Plan II integrates all but nineteen all-black or predominantly black units, but includes no all-white units. Plan I-III would require substantially greater times and distances of transportation than Plan II. The District Court chose Plan II, redesignating it "Plan Z," as hereinabove mentioned.

Plan I-III would desegregate all junior and senior high school units. Plan II leaves two all-black high schools and four all-black junior high schools. Once again, Plan I-III would involve the greater degree of transportation. The District Court opted for Plan II at this level.

It is estimated, based on projected figures,[1] that Plan II will enable eighty-three percent of the Memphis public school students to attend school in a desegregated situation. To achieve this result, over 38,000 children will be bused to school. (23,000 of the 38,000 bused students are in the elementary schools.) Forty-four percent of the bused students will spend between 31-45 minutes in tran-

[1] Projections were based on the attendance figures for the Spring semester of 1973 when the system was operating under interim Plan A. At that time there were 131,268 students in the system.

sit each way, but no ride will be over 45 minutes in length.[2]

Appellants point out that Plan II leaves a number of black students in all-black or predominantly black schools, and complain that some of the very schools that were all-black at the inception of this litigation in 1960 will remain so under Plan II. The solution urged both here and below by appellants is the adoption of Plan I-III. Under this proposal ninety-seven percent of the students would be placed in desegregated units. This would require the busing of 48,000 children, the great majority of whom would ride for 31-45 minutes each way, although 9,700 would have to travel 46-60 minutes.[3] The greater number of those involved in the 46-60 minute trips would be elementary students.

The District Court, sitting as trier of fact, reviewed the merits of the alternative plans submitted by appellee before reaching its decision. That decision cannot be set aside unless clearly erroneous. Rule 52(a) Fed. R. Civ. P. In *Goss* v. *Board of Education of Knoxville*, 483 F.2d 1044, 1047 (6th Cir. 1973), this Court, faced with a similar question, stated that "An appellate court simply cannot violate this settled principle of our jurisprudence, no matter how desirable a particular result may appear to be." We conclude that the District Court's choice of Plan II was not clearly erroneous and must, therefore, be upheld.

The evidence consisted mainly of projected attendance, transportation and cost figures for the various plans, and the testimony of Team members and other experts. The

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[2] The Team also worked out an alternative bus route system for both plans relying primarily on the use of expressways. The expressways result in a decrease in the transportation time for some students, although it has less effect on Plan II than on Plan I-III.

[3] Using the expressways only 5,347 students would ride for 46-60 minutes. *See* footnote 2, *supra*.

basic figures for the different plans have been discussed heretofore. A review of the testimony reveals that for a variety of reasons a majority of the Team favored the adoption of Plan II. The lone psychological expert was of the opinion that a shortening of the times and distances of transportation would inure to the benefit of many school children, especially the younger ones. Plan II was also recommended by the school staff and the Board of Education.

The District Court relied heavily on a phrase from *Davis* v. *Board of School Commissioners of Mobile*, 402 U.S. 33, 37 (1971). That phrase directs that district courts "make every effort to achieve the greatest possible degree of actual desegregation, *taking into account the practicalities of the situation.*" (Emphasis added.) To discover what constituted a "practicality," the District Court referred to *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The practical considerations set forth in *Swann* which influenced the District Court's decision in this case are as follows: First, the limited usefulness of racial quota ratios; secondly, the necessity of tolerating some one-race schools because minority groups concentrate in urban areas; thirdly, the logistical problems inherent in remedial alteration of attendance zones; and lastly, the limitations on travel that must be considered when transportation remedies are employed.

The clearest insight into the weight that the District Court gave to the practical considerations recommended by *Swann* and *Davis* is found in the following passage from the Memorandum Decision:

> "The lesser degree of desegregation in combined Plan II is based primarily upon four factors pertain-

ing to effectiveness, feasability and pedigogical soundness. Those factors are time and distance traveled on buses, cost of transportation, preservation of desegregation already accomplished, and adaptability."

The District Court's analysis of the proposed alternatives was both thoughtful and thorough, and we do not find the conclusions reached to be clearly erroneous. As we stated in *Goss, supra,* at 1047, "The experienced District Judge who has lived with this case from its inception analyzed the evidence in great detail. His findings are supported by substantial evidence and are not clearly erroneous." The above statement has equal validity here. The May 3, 1973 Memorandum Decision of the District Court ordering the implementation of Plan II and designated Plan Z is hereby affirmed.

No costs are taxed, and each party will bear their own costs on the appeal.

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION
No. 3931-Civil

DEBORAH A. NORTHCROSS, *et al.*,
Plaintiffs,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*,
Defendants.

MEMORANDUM DECISION ON
TIME TABLE FOR UNITARY PLAN

This ruling pertains to the additional instruction of the Court of Appeals for the Sixth Circuit set forth in its most recent remand opinion in this much litigated case, filed originally in 1960.

On August 29, 1972, the Court of Appeals filed the decision in which it affirmed this Court's order of April 20, 1972, wherein this Court ordered that the defendant system implement the desegregation plan known as Plan A, commencing with the opening of the school year 1972-73. Plan A called for the use of the transportation of pupils as a means of desegregation, but it did not complete the task of establishing a unitary system as required by the constitution. Consequently, the Court of Appeals added an additional instruction to its ruling affirming this Court's approval of Plan A. That instruction directed this Court "to

prepare a definite timetable providing for the establishment of a fully unitary school system in the minimum time required to devise and implement the necessary desegregation plan." 466 F2d 890, 895. At that time the Court of Appeals also dissolved a stay of the Court's April 20, 1972 decision which the Court of Appeals had entered pending its ruling on an expedited appeal.

Regrettably, the Court of Appeals' ruling was filed one day after the school year had started without the implementation of Plan A. Because the defendants had discontinued preparations for implementation of Plan A during the period of the stay, and further because the school year had started, it was necessary for this Court to conduct a hearing on what different time the plan should be implemented in the light of the changed circumstances. This hearing resulted in this Court's ruling that Plan A should be implemented as modified at the beginning of the second semester of the 1972-73 school year (Jan. 1973). Memo. Dec. in this cause filed 9-29-72.

On October 27, 1972, a hearing was held in this cause which addressed itself to the issue of how and when this Court should comply with the "additional instruction" of the Court of Appeals. On November 15, 1972, this Court filed its decision on that topic. In that ruling the defendant Board of Education was directed to prepare a pupil locator map or its equivalent and to appoint persons charged with the responsibility of preparing a plan for further desegregation as required by the Court of Appeals remand. School boards, who have previously maintained *de jure* dual systems, are clearly required to present a plan to rid the system of its former constitutional infirmities. Therefore, this Court directed the defendant Board to require its designated team to report its progress to the Board at least

semi-monthly. Additionally, the defendant Board was directed to report periodically to the Court on the progress being made in furtherance of the Court of Appeals directive. The Board designated a biracial team composed of staff personnel of the Board.[1]

The team undertook its complex assignment, and reports were made to the Board and to the Court as contemplated. However, the results of the team's preliminary efforts indicated a method that contemplated changing the grade structure of certain junior and senior high schools. This meant effectively closing some long established high schools. In some cases the team paired separate black and white 7th through 12th grade units by assigning the 7th through 9th grade pupils from both schools to one unit and the 10th through 12th grade students to the other. This approach met with dissatisfaction from some members of the Board, both black and white, and prompted certain Board members to request that the team take different approaches to solving the desegregation problem. Some Board members became active and worked with the team in the preparation of alternate plans to the end that some of the alternate plans are known by the surname of the Board member who suggested that basic plan.

This process resulted in alternate proposals for the Board to consider as a means of implementing the Court of Appeals directive. Five plans were submitted because the team prepared separate plans for elementary schools and secondary schools (junior and senior high). These

[1] The team consisted of the Director of Research and Planning of the system, a principal of a black junior high school, a principal of a desegregated high school, who was relieved of his duties as principal in order to devote full time to the team, the Director of Race Relations of the system and a Planning Assistant in the Department of Research and Planning.

plans are basically two separate elementary through high school plans with an alternative for the elementary schools, which is adaptable to either separate secondary plan. The separate complete plans were designated secondary Plan I, which complements elementary Plan III, and secondary Plan II which complements elementary Plan II. The third alternate elementary plan is known as the Team Plan.

On March 9, 1973, the Board considered the various plans. H.E. 40. The Board was unable to arrive at a majority vote on any combination of the plans before it. This resulted in a resolution in which a majority voted to submit all plans to the Court with a suggestion that secondary Plan II and elementary Plan II would be the "least disruptive and least expensive plan" that would meet the requirements of the constitution.[2]

After the above action by the Board, the Court required the parties to file position pleadings in which each set of parties was to indicate its position with regard to the action of the Board to the end that a hearing could be conducted on the objections and the supportive positions of the parties to the respective plans. This resulted in the plaintiffs supporting secondary Plan I with modifications and elementary Plan III as presented, and the Board supporting secondary Plan II and elementary Plan II as presented.

On April 18, 1973, what proved to be a three day hearing was commenced on the conflicting positions of the parties, and this decision constitutes the findings of fact and conclusions of law on that hearing and the record in the case.

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[2] It should be noted that the phase of H.E. 40 which resolved that the satellite zones would be chosen by a random selection method, was later rescinded so that the satellite zones would be established on a geographic basis.

CHOICE OF PLANS

The problem to be overcome in this system is the excessive number of one-race schools. As the Court of Appeals noted in affirming this Court, this system continued *de jure* segregation through a pattern of school location decisions, selective construction and systematic over and under utilization of school buildings. In the 1971-72 school year (pre Plan A) 79% of the schools had essentially monolithic racial structures, and 87% of the black students still attended one-race schools. 466 F2d 893.

As heretofore noted in earlier rulings, the City of Memphis has limiting boundaries on the west in the form of the Mississippi River and on the south in the form of the Mississippi-Tennessee state boundary line. At the present time the city is approximately 250 square miles in size.

Plan A, as implemented, was a means of desegregation employing the pairing and clustering of schools having contiguous zones and requiring minimal transportation. The plans presently before the Court, therefore, include the difficult task of desegregating non-contiguous and sometimes remote school zones. Plan A used the easier mid-city pairings; therefore, the remaining task includes trying to transfer pupils living in opposite extremes of the city. A substantial number of the white students live in the eastern portion of the city, and a substantial number of the black students live in the western portion of the city in very heavy concentrations.

The details of the two secondary plans and the three elementary plans prepared by the staff team are set forth in Hearing Exhibit 1, which is a 125 page document with an 11 page appendix. The team members have undertaken to desegregate the respective schools by assigning various

numbers of students from schools of a predominate race to schools with an opposite predominate race by the use of satellite zones and boundary changes. The satellite zone boundaries were not definitely established pending a determination of the choice of plans after the hearing.

The pupil locator map and computer printout was based upon pre-Plan A attendance figures (December 15, 1972). Therefore, the proposed satellite zones and changes do not take into account the 7500 to 8000 pupils who left the system after Plan A was implemented (January 24, 1973). The proof establishes that a sizeable number of those pupils left the system due to the implementation of Plan A, particularly in schools where white pupils were assigned to certain former black schools. H.E. 29. However, some of this decrease in enrollment also can be attributed to normal attrition during the school year from dropouts and other causes. There is also proof from the Superintendent that some of the pupils have returned to the system in later enrollment periods. However, no figures are available to show exactly how many.

Hearing Exhibit 1 also contains Time and Distance Analyses for the estimated necessary bus transportation and its cost estimates. In this regard, the bus transportation information is more reliable than the estimates made in the past concerning this system because the defendant system now has actual experience based upon the operation under Plan A. However, some cost estimates for long distance transportation are subject to further negotiations with the contractor who furnishes the buses.

Hearing Exhibit 1 also contains some separate sections devoted to the Raleigh Area Addenda. This separate consideration of the "Raleigh Area" pertains to a section of the City of Memphis and the County of Shelby which was

planned for annexation into the City of Memphis and therefore within the jurisdiction of the defendant system.

In furtherance of a practice followed in recent years, the City of Memphis undertook to annex a portion of Shelby County effective December 31, 1972. This portion was located to the north of a central portion of the former city limits. It included the community known as Raleigh. In prior years when an annexation was made effective on December 31, by mutual agreement of the two public school systems, the County Board of Education continued to operate the schools within the annexed area for the remainder of that school year and the defendant City Board took over the schools at the commencement of the next school year. However, the entire proposed annexation of the Raleigh Area was not accomplished because litigation was initiated in the state courts by some residents living in the proposed area which resulted in the annexation of approximately two-thirds of the area pending the ultimate outcome of the litigation. This created problems for the Shelby County and City of Memphis Boards of Education because the location of the schools in the proposed area were so arranged that some of the students living in the area actually annexed were assigned to schools close to, but actually located in the area not annexed. In an effort to resolve these problems, the Shelby County and City of Memphis Boards of Education entered into an agreement pertaining to the students and the schools within the problem area. H. E. 1, page 41.

Under this agreement the defendant City Board will operate the Brownsville Elementary School actually located just outside the corporate limits of the city, and other specific student assignment plans and options are provided

for in order to educate the students in the Raleigh area pending the outcome of the annexation litigation.

Due to the time at which this problem arose, the Raleigh Area phase of the defendant's desegregation plans was prepared separately from the basic city plans. The proposal of the team which was adaptable to Plan II for the remainder of the city is set forth on page 37 of Hearing Exhibit 1, and the proposal of the team which is adaptable to secondary Plan I and elementary Plan III is set forth in hearing Exhibit 1-A.[3] On motion of the plaintiffs the Shelby County Board of Education was made a party to this case for the limited purpose of considering the portions of the City Board plans which effect the Raleigh Area.[4]

Although the addenda to the basic plans pertaining to the Raleigh Area are complete with regard to students to be assigned and the projected degree of desegregation in each school affected, some of the more specific factual proof is not established in the record.

The proof reflects an additional alternative proposal for the Raleigh Area. H. E. 21. However, this proposal is contingent upon the completed annexation of the total proposed area or an alteration of the agreement between the County and City Boards so that schools presently under the jurisdiction and operational control of the County Board will be available for pairing or student transferring in furtherance of the City Board's desegregation plan. Be-

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[3] Caution must be exercised in considering the exhibits because some portions of Hearing Exhibit 1, including various analyses, were prepared before the Raleigh Area Addenda were prepared.

[4] The Shelby County Board of Education is a defendant in case No. 4916 in this Court, styled *Robinson* v. *Shelby County Board of Education*. See 467 F.2d 1187 for the Court of Appeals ruling approving the plan in that case as unitary.

cause neither of those contingencies presently exists, the Court concludes that the proposal set forth in H. E. 21 is inappropriate for consideration in the City Board's plan of desegregation at this time.

As heretofore indicated, the plaintiffs advocate basic secondary Plan I, as modified, and elementary Plan III, subject to a change pertaining to Campus School. The modifications were presented by Dr. Gordon Foster, Director of the Title IV Center located in Miami, Florida. These modifications primarily increase the degree of desegregation in the system by requiring a higher percentage of minority representation in each school than is contemplated by the team's proposed Plan I. H.E. 32.

As heretofore indicated, the defendant Board advocates secondary Plan II and elementary Plan II with the appropriate Raleigh Addendum as proposed.

The basic enrollment date used by the team, without the area included in the Raleigh annexation area, is as follows:

Grades	Black %	White %	Totals
1-6	40,521 (61%)	25,896 (39%)	66,417
7-9	20,164 (57%)	14,939 (43%)	35,103
10-12	14,886 (50%)	14,682 (50%)	29,748
	75,571 (58%)	55,697 (42%)	131,268

Secondary Plan I, as modified, (H. E. 32) desegregates all senior and junior high schools in the system, primarily by boundary changes and satellite zoning. It also phases out one high school unit and some junior high units from certain presently combined junior and senior high school attendance units.

Under Plan I most of the secondary units have projected minority attendance between 40 and 50 percent. The lowest percentage of minority representation is 34% black in the

high schools and 35% in the junior high schools. Of the 28 senior units 8 are more than 50% white and of the 39 junior high units 8 are more than 50% white.

Elementary Plan III primarily uses pairing or clustering of schools with non-contiguous zones as opposed to satellite zoning. It has 5 attendance units out of a total of 99 with less than 30% minority representation.

Secondary Plan I as modified has some extreme proposals. For example, Ridgeway High School, the easternmost school in the system, has a projected enrollment of 509 white students and 3 black students. Plan I as modified (H.E. 32) proposes that 59% of the white students be bused 7.4 miles to a former black school and 240 black students from that school be bused to Ridgeway to the end that this former 99% white school would become 54% black and 46% white.

Plans II, secondary and elementary, advocated by the Board, provide a lesser degree of desegregation. Under those plans all former white schools are desegregated. The involuntary minority representation in those plans is generally 30%. Those plans leave 2 high schools in a total of 28 attendance units black. Ten of those schools have a minority representation below 30% with the lowest projected percentage in that group 25% black at Sheffield.

In the junior high schools 4 of the 39 attendance units are projected one-race black schools. Seven attendance units will have a minority representation between 25% and 29%. As in the case of Plan I modified, the primary method of desegregation of the secondary schools in Plan II is satellite zoning and boundary changes.

Elementary Plan II has 99 attendance units. As in the case of elementary Plan III, the primary method of desegregation is pairing and clustering schools in non-con-

tiguous zones. This plan will result in maintaining 13 all Negro schools and six 90% or greater Negro schools.

The issues pertaining to the time, distance and cost of transportation were also included in the proof presented at the hearing. In addition to the criteria set forth in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), namely, whether or not the time and distance of transportation would "risk the health of the children or significantly impinge on the educational process", the parties presented proof on the economic feasibility of the required transportation. A complicating factor on these issues is presented by virtue of the question whether or not the interstate highways (expressways) will be used in accomplishing the necessary transportation. Twenty percent or less time is needed to transport students when 50% of the distance can be traversed on expressways, unless a traffic jam is encountered, in which case the time saving is reversed to a protracted delay, thereby interfering with the multiple trip schedule of the buses.

The plaintiffs advocate the use of the expressways thereby creating shorter overall transportation times and costs. The defendants advocate not using the expressways thereby assuring more reliable delivery of students and a safer means of transportation.

Pages 123 and 124 of Hearing Exhibit 1 reflect the estimated transportation data with and without the use of the expressways under the basic plans. Hearing Exhibit 34 reflects the transportation data pertaining to Plan I modified and otherwise summarizes the comparative plans generally. Based upon these exhibits and the other proof, the Court finds that the estimated cost of transportation under secondary Plan I modified and elementary Plan III without the use of expressways and including the Raleigh Area would

be $2,692,441.30 for transportation of an estimated 57,563 students. By using the expressways this figure would be reduced to $2,573,095.95.

The comparative figures for Plans II (elementary Plan II and secondary Plan II) with the Raleigh Area included are $1,683,897.70 without the use of the expressways and $1,679,622.70 with the use of the expressways. This is based upon the estimated transportation of 39,904 students.

The cost figures for both plans are based upon estimates of $38.25 per year, per pupil, with one-way times under 30 minutes, of $47.25 per pupil with times between 31 and 45 minutes and of $71.10 per pupil with times between 46 and 60 minutes.

Under both high school plans no students would be transported in excess of 45 minutes one way. H.E. 1, p. 123 and H.E. 34. Under Plan I modified, with the use of the expressways, no junior high students would be transported more than 45 minutes. H.E. 34. However, if the expressways were not used, over 2200 junior high students would be transported more than 45 minutes under Plan I modified. H.E. 1, p. 123. Under Plan II no junior high students, with or without expressway use, would be transported more than 45 minutes. H.E. 1, p. 124. However, under Plan III (elementary) 5341 students would be transported between 46 and 60 minutes with the use of the expressways and 7501 would be transported between 45 and 60 minutes without the use of the expressways. H.E. 34. Without the use of the expressways, the maximum travel time under elementary Plan III would be 63 minutes. On the other hand, under Plan II (elementary) no students would be transported in excess of 45 minutes.

The lesser degree of desegregation in combined Plan II is based primarily upon four factors pertaining to effec-

tiveness, feasibility and pedigogical soundness. Those factors are time and distance traveled on buses, cost of transportation, preservation of desegregation already accomplished, and adaptability.

With regard to the factor of time and distance traveled, the proof does not establish a transportation time in specific minutes at which "the time or distance is so great as to either risk the health of the children or significantly impinge on the educational process." *Swann,* 402 U.S. 30-31. However, three team members, all of whom have extensive educational experience in this system, and Dr. Leon Lebovitz, a psychologist, all testified that transportation times in the neighborhood not more than 30 to 40 minutes are preferable to the welfare of elementary pupils.

With regard to the cost of transportation factor, the longer trips for the buses significantly increase the per pupil cost. This is due to the actual operating cost for longer distances and the fact that more buses are required because the same bus cannot make as many multiple trips in the mornings and afternoons. Also a greater number of buses increases the congestion and risk of accidents on the streets and highways of this major urban city.

Additionally, it must be remembered that the Board has not provided transportation in sizeable amounts until this year, therefore, the transportation costs of the plans before the court are an extra expense item in a budget that is inevitably trimmed by the Council of the City in the process of appropriating the tax monies to the various agencies and departments of the city. A further budgetary problem is created when it is realized that the transportation expense has and is expected to diminish the income in an unpredictable amount. As indicated above, the implementation of Plan A caused a sizeable number of students to leave the

system and this practice is expected to continue, particularly when long distances of transportation are imposed. Because the major source of the Board's funds comes from state funds based upon the number of students in the system, a decrease in income will be caused.

It is also noted that involuntary desegregation of the schools by busing involves costs in addition to the actual cost of transportation. Due to the long history of racial discrimination in this city and its resulting racial hostility, experience has shown that extensive preparation is necessary to effectively bring the students of different races together. In some cases additional personnel must be assigned to avoid or correct racial confrontations in the mixed schools. Personnel time costs money.

With regard to the factor of the preservation of desegregation already accomplished, this Court has previously directed and approved, the practice of preserving desegregated schools which have accomplished desegregation voluntarily. Based upon this same reasoning, the team drafted Plan II upon a basis that Plan A heretofore implemented would be preserved as much as possible. In this process the team did undo some junior high Plan A pairings which had created one-grade schools, by sending all students in two or more zones to one school for grades seven and eight and the remainder of the junior high students in those zones to another school for the ninth grade. Undoing this practice by satellite zones or otherwise was considered to be educationally preferable.

The fourth factor considered by the team in the preparation of Plan II, namely, adaptability, pertains to the effectiveness of the proposed plans. The testimony on this subject was guarded and sometimes delicately worded because it pertains to the ticklish topic of "white flight".

However, the proof does establish that one of the reasons that the remaining number of black schools were not included in the plan was the expected unwillingness of white patrons to send their children to those particular black schools in the light of the location and the distances involved in the necessary exchange of white and black students.

The delicacy with which this factor was presented by the witnesses undoubtedly was based in part upon this Court's holdings and findings in the past to the effect that the defendant Board was not privileged to maintain the extremely segregated schools merely because it was thought that the white citizens disagreed with the principle of desegregated schools. However, the effectiveness requirement consistently set forth in the opinions of the Supreme Court must also be considered as a limiting practicality referred to in *Swann* and *Davis*, 402 U.S. 1 and 33 (1971). While this Court is fully cognizant of the teaching of *Brown* v. *Board of Education*, 349 U.S., 299-300 (1955), *Monroe* v. *Board of Commissioners*, 391 U.S., 450, 458-59, and *Swann*, 402 U.S. 1, 12-13, namely, that the vitality of constitutional principles cannot be allowed to yield because of disagreement with them, the fact remains that a system cannot effectively desegregate by the practice of involuntarily assigning members of the opposite race to certain schools if there are not sufficient members of the white race available to assign.

Hearing Exhibit 29 from the recent hearing provides attendance figures by race in some schools involved in Plan A. It shows projected and actual attendance figures for the schools listed thereon on three different dates: projected Plan A enrollment as of March 3, 1972, before Plan A was adopted by this Court for implementation at the beginning

of the 1972-73 school year; projected Plan A enrollment as of December 15, 1972, after Plan A was approved by this Court and the Court of Appeals, but before it was implemented; and actual Plan A enrollment as of February 1973, after it was implemented on January 24, 1973.

This exhibit shows as a fact that there was a pattern of white students leaving the zones of former white schools after Plan A was announced as a plan of desegregation for the 1972-73 year, and a failure to an even greater degree of white students to actually attend the former black schools when the pairings were implemented. While it is true that some of the decreases in projected enrollment between March 1972 and December 1972 were caused by reasons other than "white flight", such as modification of Plan A as in the case of Melrose and Sherwood Junior High Schools, the above mentioned pattern is clearly established. For example, a comparison of the pairing between Shannon and Grandview Elementary Schools is made. These schools have contiguous zones. Grandview is in a predominantly white neighborhood. The Shannon zone, although contiguous to the Grandview zone, is in a black neighborhood. In the school year 1971-72 Grandview had 887 white pupils and 2 black pupils, and Shannon had 919 black pupils and no whites. H.E. 18 March hearing in this cause. The white reaction to the projections and results of Plan A is as follows:

School	Grade Organi-zation	Plan A Projected Enrollment (March 3, 1972)	Plan A Projected Enrollment (Dec. 15, 1972)	Plan A Projected Enrollment (Feb. 1973)	
Shannon (black)	4-6	W 429(53%) B 376(47%) T 805	W 352(48%) B 376(52%) T 728	W 86(19%) B 377(81%) T 463	— 266 + 1 (— 265)
Grandview (white)	1-3	W 480(52%) B 450(48%) T 930	W 379(52%) B 352(48%) T 731	W 230(40%) B 349(60%) T 579	— 149 — 3[5] (— 252)

This refusal of the white students to attend school with black students, particularly at black schools, results in their leaving the system for private schools or moving to unaffected areas. The inability of a court to overcome the change of the racial makeup of a neighborhood was a finding in the Court's ruling in this cause, filed December 14, 1972, on pages 6 and 7. Therein the Court noted that efforts to desegregate White's Chapel black school in the southeastern part of the city had failed because the whites moved from the area known as Westwood Hills Subdivision. This area had been used by Chief Judge Bailey Brown in a pairing in the Shelby County School case before that area was annexed.

On the basis of the above findings, this Court concludes that implementation of the secondary Plan II and elementary Plan II with their Raleigh Addendum at the commencement of the 1973-74 school year will constitute compliance with the "additional instruction" set forth in the

[5] Some decline in enrollment at the beginning of the school year was attributable to a decrease (non-racial) in the number of pupils starting in the first grade. This has been evident in recent years and is expected to continue.

August 29, 1972 opinion of the Court of Appeals, even though the plans leave some all black schools.

In support of this conclusion, this Court primarily relies upon *Swann* and *Davis,* 402 U.S. 1 and 33, which are the two opinions which the Court of Appeals directed this Court to consider in the 1971 remand of this case. 444 F2d 1179. As this Court has noted previously, the opinion of the Supreme Court in *Davis* directs the district judge or school authorities to "make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." 402 U.S. 37. As this Court has also noted previously, the Supreme Court in Section V of the *Swann* opinion considered four essential problem areas and their limitations, in the field of student assignment to accomplish a unitary system. 402 U.S. 22-31. In the portion of the opinion which considers "One-race Schools" the Supreme Court recognizes the familiar phenomenon in metropolitan areas that minority groups are often found concentrated in one part of the city. Immediately thereafter the Court stated: "In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change." 402 U.S. 25.

It is in that same section that the Court stated on pages 26 and 27 as follows:

> "An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of

> segregation. In order to be effective, such a transfer arrangement must grant the transferring student free transportation and space must be available in the school to which he desires to move."

In the section on the "Remedial Altering of Attendance Zones," the Court recognized the pairing and grouping of non-contiguous zones as a permissible tool in the light of the objective sought. The Court further noted that the necessary remedial alteration of zones may be administratively awkward, inconvenient and burdensome. However, on this topic the Court also stated: "No fixed or even substantially fixed guidelines can be established as to how far a court can go, *but it must be recognized that there are limits.*" (Emphasis added). 402 U.S. 28.

In the section entitled "Transportation of Students", the Court recognized the widespread use of bus transportation by school systems throughout the nation and found that the use of transportation as required by the district judge in the *Swann* case was permissible. The Court again found that no rigid guidelines could be given; however, it did note that there are limitations on the use of transportation as a means of desegregation.

While no specific times or distances of transportation were prescribed, the Supreme Court did include in its opinion approving what the District Court prescribed for the Charlotte-Mecklenburg system, the following observation: "The trips for elementary school pupils average about seven miles . . . they would take 'not over 35 minutes at the most' ". 402 U.S. 30. In the same section the Court also stated: "It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students." 402 U.S. 31.

This Court believe that the implementation of secondary and elementary Plan II will meet the suggested limitations set forth in *Swann* "without frustrating the appropriate scope of equity." 402 U.S. 31. *Therefore, if the Plans II are effective the system will be unitary as that term is used in the controlling opinions.* However, the plans are at present paper plans without specifically determined satellite zone boundaries. If the implementation of the plans does not prove to be an effective means of desegregation, further proceedings will be required to determine what should then be done.

CAMPUS SCHOOL

As heretofore noted, the plaintiffs seek a change in the assignment method established by the Court for the elementary school known as "Campus School". This is a school built on the Memphis State University campus pursuant to a contract between the Education Department of Memphis State University and the defendant Board. Under Plan A Campus School was proposed to be closed as a school with a regular attendance zone. After the most recent remand, this Court conducted a hearing on a proposed plan for operating Campus School as an integrated laboratory school with the opportunity to study the results of a genuinely integrated student body. This Court approved a plan which, *inter alia,* required a racial ratio of 50-50 with a 10% leeway. Opinion of this Court filed in this cause November 1, 1972.

Plaintiffs now seek to have this Court amend the provisions of its former ruling so that proximity to the school would not be an assignment feature at Campus School and further that the Court establish a larger percentage of Negroes so that the laboratory experience would more

nearly approach the racial percentage in the system as a whole. (61% black and 39% white in the elementary schools).

Proof was offered at the recent hearing on the operation of the school since January 24, 1973, in the light of the requirements imposed by the Court. The proof established that Memphis State University personnel and Campus School personnel actively recruited Negro applicants for Campus School which was formerly a white school and the ratio is now approximately 50-50. A foundation grant has been obtained and a laboratory experience is being conducted at that institution. Therefore, the Court concludes that the plan for Campus School approved in the Court's opinion of November 1, 1972, should not be disturbed.

Transfer Provisions

At the recent hearing, the defendant Board applied for the right to implement certain transfer policies in connection with the further desegregation plans, which will require considerable disruptive reassignments of students. The Recommended Transfer Policies are set forth in Hearing Exhibit 15.

There are nine numbered transfer provisions plus an additional one (unnumbered) pertaining to non-resident students who transfer to the defendant system on a tuition basis.

In a system this size there are enough unusual situations which occur so that some discretion should be given to allow transfers. However, experience has shown that due to the widespread racial hostility to desegregation, some patrons will attempt to abuse transfer provisions by fabricating factual situations for the purpose of avoiding assignments in furtherance of desegregation. This creates

problems which can cause bad faith accusations against those charged with administering the transfer policies.

Numbered recommendations 1, 2, 3 and 9 on Hearing Exhibit 15 are not opposed by the plaintiffs. Respectively, those are transfers for (1) seniors in affected schools during the 1973-74 school year, (2) special education students and one accompanying brother or sister, (3) children of Board employees assigned to a particular school, and (9) majority to minority transfers with transportation provided when the transfers are from schools not affected by the plan of desegregation.

This Court approves those four categories of transfers. However, some further observations must be made with regard to item 9. This is the majority to minority transfer from schools not affected by the plan with Board transportation provided. This is a provision which is required by *Swann* on page 26, *supra*. A form of this transfer provision has been in force in this system since the *Swann* opinion was announced. However, the existing provision uses the public transportation system for those majority pupils who elect to transfer to minority race schools. The number of students who have sought this type of transfer has been relatively few.

There is no specific plan before the Court for improving the public appeal of this type transfer, therefore, the Court does not order a specific means of encouraging this type transfer. However, it does appear that more specific efforts should be adopted to encourage this type of transfer from the 25 schools that will remain black after the implementation of Plans II. Specific majority white schools could be chosen as available for those transfer, and a program of recruiting could be instituted whereby staff personnel would go to the patrons of the all black schools and urge

them to transfer. If enough interest is shown, it would appear that special buses could be rented or hired in lieu of the public transportation routes.[6]

Transfer Recommendation Policy No. 4 pertains to adjustment transfers for psychological or behavioral reasons. Transfers of this type are presently allowed with the proviso that the transfer must be to a school of the same racial majority to minority makeup as the school from which the transfer was issued. However, in some instances this has created problems due to distance. These transfers are usually involuntarily made for disciplinary problem students. The Court aproves this amended version of the transfer policy subject to the proviso that such transfers will not be permitted for the mere purposes of avoiding desegregation assignments.

Transfer Policy No. 5 invites abuse because it allows transfers for "medical reasons or severe hardship situations." It does have a further requirement of documentary support and approval by the Board Attorney.

Although there is no present policy of this nature, some transfers have been allowed in extreme cases by consent, such as wheelchair patients and instances of involved family problems which would create a severe hardship if a student were required to attend a school removed from the area of his residence.

In order to allow some flexibility, this type transfer is approved subject to the additional proviso that a committee of three staff personnel shall be appointed to consider such transfers and if a majority of the members approve such a

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[6] In this regard the Court notes that the Supreme Court in *Swann* approved some oneway busing from "the Negro residential area of the city to the nearly all-white Independence High School." 402 U.S. 8 and 9.

transfer the application shall then be forwarded to the attorney for the Board with a copy of the recommendation to the attorneys for the plaintiffs. Approval of the Board Attorney shall authorize the committee to grant the transfer. If the attorney for the plaintiffs disagrees and the matter cannot be resolved by consent, the attorneys for the plaintiffs may move for a hearing before the Court.

Policy No. 6 pertains to some 10th grade and some 11th grade students who seek vocational education courses of study not offered at the schools to which Plan II would transfer them. Policy No. 7 pertains to 11th grade students in the school year 1973-74 who have begun courses in "major or college entrance requirements" which would not be available at the schools to which Plan II would transfer them.

These are approved as proposed, except high school major courses shall be eliminated from Policy No. 7, that is to say those transfers will only be granted for courses needed for college entrance requirements.

Policy No. 8 authorizes minority to minority transfers without Board furnished transportation. It is limited to schools not affected by the plan of desegregation. This is an existing transfer provision which this Court previously approved in order to permit persons in isolated minority situations to transfer to a minority situation of a greater percentage. This policy will be allowed to continue.

The unnumbered recommendation pertains to students who do not live in the corporate limits of Memphis but are allowed to attend schools in the defendant system on a tuition basis. As the Court noted in approving the provision previously, it is *de minimus*. It is stated slightly different in Hearing Exhibit 15 than it was as previously approved. Under the existing provision those students may transfer to a school of the same majority-minority race as

the student would attend in the system of his residence.[7] This is preferable to the manner in which it is stated in Hearing Exhibit 15 wherein persons in the minority race may not be granted that type of transfer.

SUMMARY

As indicated above, this Court approves and adopts Plans II for implementation at the beginning of the 1973-74 school year as the proper means of complying with the Court of Appeals additional instruction. The defendant Board is hereby directed to require the team to prepare the specific satellite boundaries and the zone boundaries necessary to implement Plan II. In this regard the team has asked for discretionary power to alter the projected number of students in the satellite zones if natural boundaries produce a different number of projected pupils for transfer. The Court grants this discretionary authority; however, the Court also notes that the transfer provisions will affect the number of students in the satellite zones, there will undoubtedly be hostile reaction to the involuntary assignments and that the proof shows that there will be some attrition in white neighborhoods. Therefore, when possible, discretion should be exercised in favor of assigning more students for satellite transfer, particularly in situations where the projected minority is less than 30%.[8]

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[7] Of course, a variation of this policy should be allowed if the student wishes to become a minority race student in the Memphis system.

[8] Since the hearing in this cause the Court of Appeals for the Sixth Circuit has announced its in banc ruling in *Mapp* v. *Board of Education of Chattanooga*, —— F.2d —— (April 30, 1973). The ruling affirmed the District Court's rulings in that case reported in 341 F. Supp. 193 and 329 F. Supp. 1374. Although the factual situation presented in *Mapp* is different from this case, the District Court did approve a plan which called for ratios of not less than 30% minority representation in schools subject to the plan.

Without meaning to be critical of the team, whose members were made court witnesses, the Court observes that it is unfortunate that the respective plans had such unimaginative designations as I, II, III and the Team Plan. This has created some confusion in the record because even the lawyers inadvertently used the wrong number on some occasions in presenting their client's problems.

Having started with Plan A as the first truly significant involuntary means of desegregation in this city, the Court hereby designates the combined plans approved above as Plan Z, in the hope that this will prove to be the terminal plan for this long standing problem in the City of Memphis.

The Court will retain jurisdiction of this case pending a determination of the effectiveness of the implementation of Plan Z. Additionally, the Court will continue the current practice of requiring notice by the defendant Board to counsel for the plaintiffs when site acquisitions and new construction are contemplated. 402 U.S. 21.

This 3rd day of May, 1973.

ROBERT M. MCRAE, JR.
United States District Judge

District Court Judgment of May 17, 1973

In the United States District Court
For the Western District of Tennessee
Western Division

No. 3931—Civil

Deborah A. Northcross, *et al.*,

Plaintiffs,

vs.

Board of Education of the Memphis City Schools, *et al.*,

Defendants.

Judgment On Memorandum Decision
On Timetable For Unitary Plan

The issues raised by the additional instruction set forth in the August 29, 1972, remand of the Court of Appeals and of this Court's Memorandum Decision filed November 15, 1972, came on for hearing before Robert M. McRae, Jr., District Judge, and a further Memorandum Decision having been duly rendered and filed on May 3, 1973,

It is Ordered and Adjudged that the defendants take all necessary steps to implement the plan of desegregation in accordance with the provisions of the Memorandum Decision filed May 3, 1973, and all prior decisions not inconsistent with the provisions of the Memorandum Decision at the times set forth therein.

Dated at Memphis, Tennessee, this 17th day of May, 1973.

Robert M. McRae, Jr.
United States District Judge

District Court Judgment of July 26, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 3931—Civil

DEBORAH A. NORTHCROSS, *et al.*,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*,

Defendants.

ORDER ON PLAN Z ZONE BOUNDARIES

This ruling pertains to the Court's consideration of the specific zone boundaries, including the satellite zones prepared by Board of Education personnel after this Court's May 3, 1973, ruling.

After the Court approved the basic plans which were designated Plan Z, the team previously assigned by the Board to prepare the plans undertook to specifically locate the zone boundaries and satellite zone boundaries consistent with the basic plan and the Court's ruling. In the process the team and the Board approved certain guidelines to be followed. These guidelines are as follows:

1. Where possible establish satellite zones so that no student will be bused at both his junior and senior high years but will be enabled to remain at home at one of these levels.

2. Where possible do not create a satellite zone which will encompass the school building.

3. Where possible make every attempt to transport the junior high students the shortest time/distance in preference to the senior high students.

4. Where possible (contiguous boundaries) create satellite zones through boundary changes.

5. Where possible attempt to include an entire geographical area within the neighborhood rather than use fragments of several neighborhoods when establishing satellite zones.

In their work the team also used the post implementation of Plan A attendance records. This reflected a decrease in enrollment based in a large measure on white flight from some zones effected by Plan A.

The results and certain changes which the team thought were required by the circumstances which their post hearing efforts disclosed were included in a Report to the Court filed May 24, 1973.

Upon the request of counsel for the plaintiffs the deposition of Dr. O. Z. Stephens, Jr., the head of the Board designated team, was taken on June 25, 1973. This was an inquiry into the methods of and results of the team's efforts.

Thereafter, on July 2, 1973, the plaintiffs filed a Response to Defendants' Report to the Court of May 24, 1973. The response contained an objection to the strict adherence to guidelines 1 and 2 set forth above insofar as that process resulted in less effective desegregation, particularly with regard to guideline 1 and the zones pertaining to transfers from Trezevant Junior High to Humes Junior High and Oakhaven Junior High to Longview Junior High and with regard to guideline 2 and the zones pertaining to transfers from Manassas Junior High to Frayser Junior High and Ridgeway Junior High to Melrose Junior High.

District Court Judgment of July 26, 1973

By agreement of counsel the contested issues were submitted to the Court on the Defendants' Report, including the exhibits attached thereto, the Plaintiffs' Response and the deposition of Dr. Stephens.

Upon consideration of the record, this Court concludes that the zones including the satellite zones and the changes in the plan proposed by the Report should be approved.

IT IS SO ORDERED.

The response of the plaintiffs also calls attention of the Court to a projection of the number of students to be transported prepared by Dr. Stephens which reflects a substantial decrease in the number of students to be transported (Ex. 1 and 2 to Dep. of Dr. O. Z. Stephens). This was a computation wherein an attempt was made to convert the decreased enrollment experienced when Plan A was implemented to the enrollment to be expected when Plan Z is implemented. This projection was made primarily for budgetary purposes and its accuracy can only be determined by actual experience.

No action is requested from the Court at this time. However, plaintiffs do suggest that if the projection proves to be accurate that enlargement of the present zones may be required in order to make the plan more effective.

As indicated above, the accuracy of these projections can only be determined by experience. On page 19 of its May 3, 1973 decision the Court stated:

> "*Therefore, if [Plan Z is] effective the system will be unitary as that term is used in the controlling opinions.* However, the plans are at present paper plans without specifically determined satellite zone boundaries. If the implementation of the plan does not prove to be an

effective means of desegregation, further proceedings will be required to determine what should then be done." (Emphasis in original)

In the recently published per curiam in banc opinion in the Knoxville, Tennessee school desegregation case the Court of Appeals for the Sixth Circuit declined to consider population shifts that had allegedly occurred in Knoxville after the District Court ruling and while the appeal was pending. However, the court noted that appropriate relief required by changed conditions was a matter to be considered by the District Court. The Court of Appeals stated as follows:

"We reemphasize the holding of this Court in *Kelley* v. *Metropolitan Board of Education of Nashville and Davidson County, supra*: 'Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances.' 463 F2d at 745-46." *Goss* v. *Board of Education of Knoxville*, p. 5 Slip opinion (C.A. 6 7-18-73).

In order that the Board may be advised of the effectiveness of Plan Z, and in the event that modification is required to be considered by this Court, it is ORDERED that the Board is to continue to maintain the pupil locator map or its equivalent.

Because this ruling pertains to the specific phases of Plan Z, it is the belief of this Court that this ruling and the supplemental record on its issues should be a part of the record before the Court of Appeals when it considers the appeal of this Court's May 3, 1973 decision.

District Court Judgment of July 26, 1973

IT IS, THEREFORE, ORDERED that the Clerk of this Court forward this ruling and the record pertaining to it to the Clerk of the Court of Appeals.

This 26th day of July, 1973.

ROBERT M. MCRAE, JR.
United States District Judge

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1338

DEBORAH A. NORTHCROSS, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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In the Supreme Court of the United States

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BRIEF IN OPPOSITION TO CERTIORARI

OPINIONS BELOW

The certiorari petition correctly lists the reported Opinions in this case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the certiorari petition.

COUNTER STATEMENT OF QUESTIONS PRESENTED

The basic issue presented in this cause is whether the District Court and the Court of Appeals for the Sixth Circuit were correct in determining that the Final Plan of Desegregation approved as "Plan Z" represents the greatest feasible amount of desegregation that can be achieved in the Memphis School System in light of the practicalities of the situation. Respondents submit that the decisions of the lower courts are correct and that certiorari should be denied.

STATEMENT OF THE CASE

Proceedings in this cause arise out of the August, 1972, Order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's requirement of a Plan of Pupil Desegregation designated as "Plan A", and requiring that the District Court implement a further Plan of Desegregation to achieve a unitary school system, 463 F. 2d 329, cert. denied, 410 U.S. 926 (1973).

At the time of that Order the Memphis City School System had a total enrollment of approximately 131,268 students of whom 58 per cent were black and 42 per cent were white.

These instructions of the Court of Appeals were carried out in the course of the 1973-4 school year. Plan A of desegregation, which involved the first substantial pupil transportation carried on by the Memphis School System, was put into effect in January of 1974 at the beginning of the second semester. This plan anticipated the transportation of approximately 14,000 students. The District Court

also directed the Board of Education to have prepared a Plan of Further Desegregation. This plan was prepared by a bi-racial team designated by the Board.[1] Various alternative plans were developed by the team and the Board ultimately recommended to the District Court Plan II which was adopted by the District Court and renamed "Plan Z" in the hope that this will prove to be the terminal plan for this long standing problem in the City of Memphis.[2] Plan Z projected approximately 39,000 pupils to be transported. The Board also filed two alternative elementary plans of desegregation which had been developed by the team and one alternative secondary plan. At the hearing which began on April 18, 1973, the petitioners sought to have the District Court adopt a combination of these plans designated as Plan I-III subject to certain modifications proposed by their witness, Dr. Gordon Foster.

Contrary to the petitioners' view, the evidence of this hearing and the finding of the District Court contained strong and conclusive reasons for rejecting the petitioners' request. It was clearly established that the plans favored by the petitioners would have resulted in substantially greater times and distances of transportation in detriment of the best interests of the school children, and cause substantial additional burden on the school system. It was also shown that these plans would result in the dismantling of the large number of desegregated schools which had been achieved in earlier stages of the desegregation process and by the pairings and clusterings involved in Plan A.

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1. The white members of this team were Dr. O. Z. Stephens, The Director of Research and Planning for the Board, and Dr. John Rutland, the Principal of Oakhaven High School. The black members of the team were Dr. William Sweet, the Principal of Riverview Junior High School, and Mr. Charles Patterson, the Director of Race Relations.

2. May 3, 1973, Opinion of the District Court, Page 32a, Petitioners' Appendix.

Dr. Leon Lebovitz, Director of Psychological Services for the school system, testified to the importance of limiting the amount of pupil time consumed by the transportation system.[3] As Dr. Lebovitz points out, no absolute cut-off point can be determined since individuals differ in their degree of tolerance to stress, but the District Court was clearly supported in its desire to avoid excessive times and distances of transportation.

Contrary to the petitioners' view that there was no unanimity among the members of the desegregation team, it was made clear at the hearing that the team viewed the times and distances in the plaintiffs' plan as excessive. Dr. Sweet who had personally prepared elementary Plan III stated that the times and distances in that plan were improper and concluded that he would not recommend this plan.[4] As shown in this portion of Dr. Sweet's testimony, the development of the plan did not signify the team's opinion that it was educationally sound. Plan III was developed at the request of one Board member who wished to see a plan which would affect every school in the system regardless of the times and distances or other practicalities which might be involved. The petitioners also misconstrue the remarks of the superintendent, Mr. John Freeman, when they suggest at page 10 of their petition that he had no personal or professional objections to the specific plans proposed by the plaintiffs. A review of the context of Mr. Freeman's remarks makes it clear that he had no objections to the process of school desegregation itself or to the idea of desegregating all attendance units if that were feasible. However, he then expressed his concern about the objectionable features of petitioners' plans in

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3. Tr. of Hearing, April 18, 1973, 444-8.
4. Tr. 163; 167-8.

terms of time and distance, cost and student fatigue and stated that he favored the plan recommended by the Board.

After an exhaustive and thorough consideration of the plans, and the practicalities bearing on the feasibility of the various plans, the District Court agreed with the great weight of the expert testimony at the hearing and approved the plan which had been suggested by the Board of Education. The team subsequently prepared exact boundary lines for the various satellite zones called for in the plan and submitted these zones to the District Court where they were approved. Plan Z was put fully into effect at the beginning of the 1973-4 school year, and the United States Court of Appeals for the Sixth Circuit has affirmed the District Court in approving this plan as a final plan of desegregation in this prolonged controversy.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Evidence Supports The Findings Of The District Court

The District Court in the present case has diligently performed the precise function which was commended to the lower courts in the case of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). In that case, this Court recognized that the district courts must perform their traditional equitable function in weighing the advantages and disadvantages of competing plans of desegregation:

> "District courts must weigh the soundness of any transportation plan in light of what is said in subdivisions (1), (2), and (3) above. It hardly needs stating that the limits on time of travel will vary with

> many factors, but probably with none more than the age of the students. The reconcilation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more than remedial measures courts of equity have traditionally employed." 402 U.S. at 575.

In the present case, the District Court thoroughly considered the competing plans of desegregation and found compelling reasons for rejecting the plans favored by the petitioners. These reasons included the critical factor of time and distance of transportation. It was undisputed that the plans recommended by the Board of Education were greatly preferable in minimizing the factor of time and distance. The plans favored by the petitioners included one-way distances ranging up to 17.5 miles as shown by Trial Exhibit 1. Many of the distances in petitioners' plan exceeded the longest distances in former Plan B which had been rejected by the District Court following the April, 1972, hearing and which had previously been found to create "some times and distances or routes of transportation in this system which apparently would not comply with the standards of *Swann*.[5] As further shown by Trial Exhibit 1, the plans favored by the petitioners would not only involve one-way times in excess of 45 minutes but would place the great bulk of all transportation times in a category of 31 to 45 minutes each way. By contrast, the plan adopted by the District Court has succeeded in greatly reducing the number of 31 to 45 minute routes and eliminating altogether routes in excess of 45 minutes.

This success is not only of benefit in minimizing student fatigue and inconvenience but will also minimize the

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5. Memorandum Decision, November 15, 1972, P. 9.

staggering of opening and closing times which will be necessary to accommodate the bus schedules.[6]

The evidence also supported the District Court in finding that the petitioners' plans would have a vast adverse effect on existing desegregated schools. Throughout the process of devising plans, the District Court has recognized the desirability of maintaining and encouraging existing school desegregation. In its Decision of December 10, 1971, the Court noted: ". . . it appears to be beneficial to take advantage of the willingness of the citizens of that area to accommodate desegregation without a total change of racial patterns in the residential and school populations."[7] Similarly, the Court in adopting Plan A stated that this plan might serve as a basis for further desegregation, but gave no indication that it intended to dismantle the desegregation accomplished either by Plan A or by the natural desegregation of neighborhoods. In keeping with this position, the desegregation team adopted as one of its criteria the desire to maintain existing desegregated situations wherever possible.[8] As Dr. O. Z. Stephens noted, the team was unanimously in accord with this proposition.[9] The testimony of Mr. Freeman showed that such an approach was particularly desirable in light of the tremendous efforts which had been made by community organiza-

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6. In order for buses to make multiple runs, it is necessary to have enough interval between school openings to allow the buses to get from one school to the next school. Thus, predominance of routes of 30 minutes or less has led to opening times being staggered at 30 minute intervals in the present school year. A predominance of 45 minute routes would mean 45 minute intervals between school openings and would aggravate the problem of children going to school and returning home in the dark.

7. Memorandum Decision, P. 20.

8. Report To The Court, January 15, 1973.

9. Tr., April 18th, P. 21. This approach was further endorsed by both Dr. Sweet and Superintendent John Freeman, Ibid. 167 and 483.

tions, individual persons, and numerous school communities which had made door-to-door efforts to encourage parents to continue to patronize the public schools.[10] Fortunately, it was possible in Plan Z to retain the great majority of existing desegregated situations and avoid requiring the communities which had been successfully desegregated under Plan A to undergo a further restructuring. By contrast, the petitioners' plan would have retained only two of the pairings which were implemented as part of Plan A. It would have dismantled and reassigned almost all of the other instances of existing desegregation.[11] It should also be noted that the disadvantages of doing away with the desegregation achieved by Plan A would be compounded many times over if the decision of the District Court were to be reversed at this late date. Instead of affecting only the number of schools which were desegregated prior to the adoption of Plan Z, the petitioners are now proposing to revise existing attendance patterns throughout the school system with the result that the very large number of schools paired and clustered under Plan Z of desegregation would be completely reworked. This process, coming at the end of three years of intensive reassignment of faculties and two years of new desegregation plans, would create unimaginable disruption in the public school system.

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10. Tr. 480-481.

11. See Ex. I. A typical example of Plan A pairing can be seen in the midtown area involving Idlewood and Rozelle Elementary Schools under Plan A. These schools were successfully paired and succeeded in maintaining a substantially bi-racial, majority black student body, thanks to a large degree of neighborhood involvement and work with parents and community groups. Plan Z maintains this pairing and allows this instance of successful desegregation to continue. The petitioners' plan would dismantle the pairing so that the Rozelle children would be paired with former white Grahamwood in East Memphis, and Idlewood paired with Orleans Elementary School in the inner city.

It was further found by the District Court that the plan favored by petitioners would involve substantially greater cost. It would involve greater total cost of the plan and—because of the substantially longer distances—a greater cost per pupil. This cost would have to come out of the operating budget of the school system which is chronically under-financed and in which fixed costs plus salaries consume in excess of 90 per cent of the Board's budget, leaving only a small fraction in total budget which must cover such items as transportation and school maintenance.[12]

Based on these findings, the District Court was clearly correct in finding that Plan Z represented the greatest feasible amount of desegregation in the Memphis School System and in fashioning the appropriate equitable remedy. These findings have now been approved by the Court of Appeals for the Sixth Circuit and are entitled to the conclusive weight which this Court has historically accorded the concurrent findings of fact by two lower courts:

> "A court of law, such as this Court, rather than a court for correction of errors and fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank and Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275

Although the petitioners contend that the District Court improperly considered "white flight" in reaching its conclusion, it is clear from a reading of the Opinion that the District Court did no more than recognize that the objectionable features of petitioners' plan—such as its undue disruption of existing desegregation, its unreasonable times and distances, and its excessive financial costs—would not

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12. Tr. 379-380; 484-488.

only impinge on the educational process generally but would have additional undesirable consequences on the desegregation process itself. In taking all proper and feasible steps toward further desegregation of the schools, neither the District Court nor the Board itself has been deterred by adverse reaction in the community to the desegregation plan. On the contrary, the companion appeals in this very case show that the District Court and the Board of Education have consistently discharged their duties in spite of attempts at boycott, economic penalization, denial of gasoline supply, and a threat on the part of the Mayor of the City of Memphis to remove the buses from the streets at the time of the implementation of Plan A. In spite of these factors and in spite of the decline of enrollment from 131,238 prior to the implementation of Plan A and Plan Z, to a total of 119,399, at the present time, the District Court has steadily required compliance with the appropriate plan of desegregation. Its refusal to adopt the excessive times and distances in petitioners' plan and to countenance the attendant disruption of existing desegregation should not be equated with improper consideration of white flight.

Respondents would also point out that the District Court was presented in this case with a logistical situation in which the construction of a plan of desegregation presented unusual difficulties. The very size of the Memphis School System, which is one of the 10 or 12 largest school systems in the country, and which is totally within a high traffic urban area, presented unusual problems in times and distances of transportation. Moreover, the geography of the City, which is cut off on the south by the state line and on the west by the Mississippi River, results in the main areas of black population being located on one extreme side of the school system and, thus, causes greater times and distances of transportation than would be in-

volved if the inner city were surrounded by areas of white residents, as in *Kelley* v. *Metropolitan County Board of Education*, 463 F. 2d 732 (6th Cir.), cert. denied, 409 U.S. 1001 (1972). Under these circumstances, it is scarcely surprising that a remaining number of schools of the majority race which were located in the most inaccessible areas of the city could not feasibly be included in a plan of desegregation.[13] Compare *Goss* v. *Board of Education*, 482 F. 2d 1024 (6th Cir., 1973), cert. denied, 42 U.S.L.W. 3423 (Jan. 21, 1974). One of the principal differences between the instant case and Goss is that no transportation system was required of the Knoxville School Board; whereas, the respondents have fully implemented an enormous transportation system within a former neighborhood school system.

Respondents would further show that there is no merit to petitioners' argument that the District Court failed to make findings of fact in support of its decision. This argument was not raised in the respondents' brief in the Court of Appeals and is merely an effort to avoid the impact on this case of Rule 52a of the Rules of Civil Procedure. The District Court made substantive findings with regard to the adverse impacts of petitioners' plan and these findings

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13. Contrary to petitioners' position that all one-race schools in the system have been held to be vestiges of the dual school system, the lower courts have held only that "many of the one-race schools are clearly the result of discriminatory action of the school board . . ." 466 F. 2d 890, 893. The schools which were not included in Plan Z are located in an extensive area of concentrated black housing in the westernmost part of the city and are removed from other portions of the city by tiers of former all-black school zones. Given this geographic isolation, they are identical with the situation in *Bradley* v. *School Board of Richmond*, 462 F. 2d 1058, affirmed by equally divided Court, 36 L. Ed. 2d ....., 1973, in which the Court noted that "The root causes of the concentration of blacks in the inner city are simply not known . . . Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend." 462 F. 2d at 1066.

should not be set aside merely because petitioners choose to disagree with them or to insist on a demonstration that implementation of their plan would have been a physical impossibility. The Court of Appeals was equally correct in concluding that the District Court's factual findings were entitled to the benefit of Rule 52a. See *Goss*, supra. See also *Mapp* v. *Board of Education*, 477 F. 2d 851 (6th Cir.), cert. denied, 42 U.S.L.W. 3290 (Nov. 12, 1973).

CONCLUSION

In the last five years, the very large public school system in the City of Memphis has experienced continual upheaval in an effort to implement a final plan of desegregation and to achieve a unitary school system. During the years 1969-70, 1970-71 and 1971-72, the system has experienced the widespread transfer of teachers to achieve a racially balanced faculty in every school in the system. In January of the 1972-73 school year, Plan A of desegregation was implemented and students and faculty were reassigned at approximately one-third of the system's schools. Finally, at the beginning of the current school year, Plan Z was put into effect and the great majority of the remaining schools experienced large scale transfers of students and faculty members. At all times, the Board has proceeded to implement with the utmost good faith the various directives of the District Court and of the Appellate Courts. Finally the point has been reached at which the District Court, supported by overwhelming evidence, has concluded that the school system has done its utmost within the limits of feasibility and should be allowed to redirect its efforts to meeting the educational needs of its patrons. This has occurred only after full utilization of all of the remedial measures permitted by the *Swann* decision. A great majority of the schools have been paired, clustered

or otherwise restructured. The faculties at all schools have been racially balanced and a former neighborhood school system has been converted into an operation involving substantial pupil transportation. Respondents submit that the courts below have fully considered and applied the remedies of the *Swann* decision and that certiorari should be denied.

Respectfully submitted,

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